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Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 100 (2d Series)
Pages 1 to 524

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SUBJECT DIGEST

Affidavit Need for

Review Board orders that record be supplemented with detailed information and affidavits relating to both the financial qualifications of and transmitter site availability of the winning comparative applicant below before it can decide whether or not to affirm *ID* or remand for further hearing.
—*Dutchess Communications Corp.*
BC Docket No. 82-442

AM Station

Commission eliminated restrictions on AM carrier usage. AM licensees will now be able to use their carrier signals for any purpose providing such usage doesn't create interference to originating or other stations. This action is similar to recent deregulation of FM and TV subcarrier use. AM band is therefore able to participate in the marketplace for carrier services heretofore provided by FM and TV subcarriers.
—*Amendment of Parts 2 and 73*
MM Docket No. 83-1322

Antenna Farm

Relocation of facilities to a *de facto* antenna farm is one public interest factor which justifies waiver of the minimum mileage separation rule (Section 73.207) where a suitable non-short-spaced (or less short-spaced) site is unavailable and a licensee's city-grade coverage is deficient.
—*Beasley B/cing of Phila., Inc.*

Appeal, Required Permission to

Review Board denied request to stay ALJ's ruling requiring applicant to make available one of its principals for cross-examination. Although captioned a stay, request was really an unauthorized appeal.
—*High Springs Television, Inc.*
MM Docket No. 84-372

Candor

(See: Affidavit Need for-*Dutchess Communications Corp.*)

CATV Program Exclusivity, Network Programming

Request for extension of waiver of Section 76.92(g) of the Commission's Rules granted for one-year period. Latest submissions by

petitioner demonstrate continued volatility of situation, poor financial position, and impact on service to the public.
—KDUB-TV, Inc.

CATV Special Relief

(See: CATV Program Exclusivity, Network Programming-*KDUB-TV, Inc.*)

Certification of Questions

Review Board certifies question whether Commission has retained exclusive jurisdiction over review functions in thirteen license renewal proceedings currently pending involving RKO General, Inc. It also denies motion for stay of all discovery relating to applicant's financial qualifications and dismisses request for extraordinary relief as an unauthorized appeal from an interlocutory ruling.
—RKO General, Inc. (WRKO)
MM Docket No. 84-1057

Character Qualifications

Review Board affirmed *ID* grants of FM permanent authority to 100% ownership-integrated applicant and AM to applicant with 60% credit who also sought FM. Latter's exception seeking additional 32% credit denied as proposing "variance" from application containing complete integration proposal specifying non-managerial duties. Former's exception seeking addition of fraudulent billing, failure to report felony conviction, and character (alcohol-drug use) issues, denied.
—Leflore-Dixie, Inc.
MM Docket No. 83-396

Children's Advertising Detector Signal

Commission denied a request to initiate a rulemaking proceeding to require TV broadcast licensees and cable companies to insert an inaudible electronic signal at the beginning and end of all commercial advertising designed for and directed to children.
—Children's Advertising

Common Carrier

Notice of Inquiry and Proposed Rulemaking adopted regarding establishment of satellite systems which would provide international communications services.
—International Satellite Systems
CC Docket No. 84-1299

Common Carrier, Accounting System

Further Notice of Proposed Rulemaking adopted regarding amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, to revise the accounting system for telecommunications entities.

—Uniform System of Accounts

CC Docket No. 78-196

Common Carrier Connecting

A telephone company may not enforce its tariff or invoke state law in such a manner as to interfere with a customer's right to connect terminal equipment to the telephone network, absent a showing that such connection would cause harm to the network. The Commission has remedial powers to award damages, where appropriate, against any carrier.

—Com Services, Inc.

Common Carrier Contract With Non-Carrier Customer

Second Report and Order readopting the Commission's revised authorized-user policy to allow non-carrier entities greater access to Comsat's INTELSAT transmission facilities.

—COMSAT

CC Docket No. 80-170

Common Carrier, Customer-Provided Equipment

Chief, Common Carrier Bureau rules that central office-located multiplexing and E and M signalling conversion equipment is not "customer premises equipment", and that it may be provided without structural separation by carriers subject to structural separation under *Computer II.*

—U.S. Transmission Systems, Inc.

Common Carrier, Interconnection

(See: Common Carrier, Customer-Provided Equipment-*U.S. Transmission Systems, Inc.*)

Common Carrier, Interconnection, Customer-Provided Equipment

Two unaffiliated customers, located in adjacent buildings, may share the use of a private branch exchange where each customer continues to subscribe separately to local telephone service. The mere furnishing of terminal equipment is not communications service.

—Com Services, Inc.

Common Carrier, Interconnection, Duty to Interconnect

(See: Common Carrier, Interconnection, Customer-Provided Equipment-*Com Services, Inc.*)

Common Carrier International

Liberalized earth station ownership policy permits the construction and operation of U.S. international earth stations which operate with the INTELSAT system outside of the Earth Station Ownership Committee (ESOC) by any common carrier.

—*INTELSAT*

CC Docket No. 82-540

Common Carrier, International Record Carrier

Commission finds that bundling the costs of telex operating supplies into telex transmission rates for directly connected customers constitutes unlawful subsidization of unregulated supplies by regulated transmission charges. The International Record Carriers and other providers of telex service are ordered to unbundle and detariff operating supplies and to file revised tariffs reflecting the removal of supply costs from telex transmission rates.

—*ITT World Communications, Inc.*

CC Docket No. 80-339

Common Carrier, Rates, Charges

Commission invites comments on proposal to adopt guidelines for optional MTS rates and rate structure plans of AT&T and other dominant carriers that the Commission can use to determine whether particular tariff filings will warrant investigation pursuant to 47 U.S.C. § 204. Notice describes several possible alternative standards that might be adopted.

—*MTS Rates*

CC Docket No. 84-1235

Comparative Criteria

Commission clarifies designation orders to permit expedited consideration of comparative qualifications of competing applicants. Administrative Law Judges directed to issue partial Initial Decisions, which are to be held in abeyance pending resolution of renewal applicant's overall basic and comparative qualifications.

—*RKO General, Inc. (WYFR-FM)*

MM Docket No. 84-1085

Comparative Coverage Issue

Review Board affirmed ALJ's dispositive Section 307(b) issue choice of community and contingent comparative issue choice among applicants in comparative broadcast hearing. Board and ALJ rejected reciprocal service showing and based comparative choice on preferences for diversification of mass media control, ownership integration, and comparative coverage.
—*Caldwell Broadcasting Corp.*
BC Docket No. 82-453

Comparative Hearing

(See: Character Qualifications-*Leflore-Dixie, Inc.*)

Comparative Issue, Contingent

(See: Comparative Coverage Issue-*Caldwell Broadcasting Corp.*)

Computing Device

Order adopted amending Part 15 to modify the requirement that 49 MHz low power communication devices be self-contained. Part 15 provides for operation of low power communication devices in the 49 MHz band without individual license. Instant Order relaxes "self-contained" requirement, thereby allowing more flexibility in design of such devices, while still ensuring compliance with technical specifications designed to control interference.
—*Amendment of Part 15*

COMSAT, Authorized Users

(See: Common Carrier Contract With Non-Carrier Customer-*COMSAT*)

COMSAT Earth Station Complex

(See: Common Carrier International-*INTELSAT*)

COMSAT TV Service Via Satellite

(See: Common Carrier International-*INTELSAT*)

Cordless Telephones

Order Granting Limited Waiver adopted permitting continued production of duplex 49 MHz cordless telephone until July 1, 1985. New rules call for cordless telephone base units to operate on frequencies near 46 MHz and portable handsets to operate near 49 MHz. Order grants nine-month extension of time to continue manu-

facture of 49 MHz cordless telephones utilizing frequencies in 49 MHz band for both base unit and portable handset.
—*Electra Co.*

Dataphone Digital Service, Interstate
(See: Common Carrier, Customer-Provided Equipment-*U.S. Transmission Systems, Inc.*)

Data Transmission
Memorandum Opinion and Order adopted addressing cable must carry status for program-related multi-channel television sound (Docket No. 21323), teletext (BC Docket No. 81-741), and telecommunications services on the TV vertical blanking interval (MM Docket No. 84-168). Commission left dockets in these proceedings open to monitor the development of program-related ancillary services.
—*Cable TV Systems*
Docket No. 21323

Declaratory Ruling
(See: Common Carrier, Customer-Provided Equipment-*U.S. Transmission Systems, Inc.*)

Deposition, Authority to Take
Review Board stays subpoena of witness for testimony in D.C. based on his unrefuted showing that his daughter's health would be imperiled by his trip from California. The ALJ may compel the parties to take his deposition, which can be videotaped.
—*Valley Broadcasters, Inc.*
BC Docket No. 82-436

Depreciation Rates
This Order approves the petition to revise the effective date for Southern New England Telephone Company's recently prescribed depreciation rates.
—*Southern New England Telephone Co.*
CC Docket No. 78-196

Designation Order, Reconsideration of
(See: Comparative Criteria-*RKO General, Inc. (WYFER-FM)*)

Diversification, of Control of Mass Media
(See: Comparative Coverage Issue-*Caldwell Broadcasting Corp.*)

Diversification, of Control of Mass Media
In ninety-day expedited proceeding, Review Board selected merged applicant for interim operation in San Diego. Preferences awarded to winning applicant for diversification, integration, and auxiliary power exceeded those given to its competitors.
—*Reginald A. Fessenden Educational Fund, Inc.*
MM Docket No. 84-972

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(See: Affidavit Need for-*Dutchess Communications Corp.*)

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(See: Comparative Coverage Issue-*Caldwell Broadcasting Corp.*)

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(See: Comparative Criteria-*RKO General, Inc. (WYFR-FM)*)

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(See: Comparative Criteria-*RKO General, Inc. (WYFR-FM)*)

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(See: Common Carrier Contract With Non-Carrier Customer-*COMSAT*)

Interlocutory Ruling Appeal From
(See: Certification of Questions-*RKO General, Inc. (WRKO)*)

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International Satellite Systems
(See: Common Carrier-*International Satellite Systems*)

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(See: Character Qualifications-*Leflore-Dixie, Inc.*)

Message Telecommunications Service (MTS)
(See: Common Carrier, Rates, Charges-*MTS Rates*)

Minimum Mileage Separation
(See: Antenna Farm-*Beasley B/cing of Phila., Inc.*)

Misrepresentation, Financial Qualifications
Review Board affirmed ALJ's denial of application. ALJ's findings of misrepresentation are supported by clear documentary and other substantial evidence.
—*Paradise B/cing Communications Systems, Inc.*
MM Docket No. 82-425

Multi-channel Television Sound
(See: Data Transmission-*Cable TV Systems*)

Offset Requirements
Both the low power television or television translator facility proposed by an applicant and the existing co-channel station which it must protect are required to employ different frequency offset designations before the application can be processed under the offset standards of the low power television interference rules.
—*Citizen TV Corp.*

One-To-A-Market-Policy
In seeking an exception to one-to-a-market policy to permit common ownership of a radio/UHF television combination in the same market, where the UHF station is profitable and no other significant Commission policy is involved, applicant's proposed programming is not sufficient to overcome public interest concerns underlying multiple ownership rules. However, application is granted subject to divestiture condition.
—*Gulf B/cing Co.*

Operation Interim
(See: Diversification, of Control of Mass Media-*Reginald A. Fessenden Educa. Fund, Inc.*)

Ownership and Management, Integration of
(See: Comparative Coverage Issue-*Caldwell Broadcasting Corp.*)
(See Also: Character Qualifications-*Leflore-Dixie, Inc.*)
(See Also: Diversification, of Control of Mass Media-*Reginald A. Fessenden Educa. Fund, Inc.*)

Ownership Minority
Memorandum Opinion and Order adopted establishing new national multiple ownership limits for radio and television b/cing by

amending Part 73 of the Rules. Group owners will be allowed to have cognizable interests in a maximum 12 AM, 12 FM and 12 TV stations. In addition, group owners of television stations will be allowed to have cognizable interests in TV stations reaching a maximum of 25% of the national audience. Additional rules have been established for groups having cognizable interests in UHF and minority controlled stations.
—*Amendment of Section 73.3555*
Gen. Docket No. 83-1009

Ownership Monopoly
The Commission has established new transitional multiple station ownership regulations for broadcast facilities. Group owners will be allowed to have cognizable interests in a maximum 12 AM, 12 FM and 12 TV stations. The transitional rule adopted herein will sunset automatically six years from the effective date of the *Report and Order.*
—*Amendment of Section 73.3555*
Gen. Docket No. 83-1009

(See: Ownership Minority-*Amendment of Section 73.3555*)

Ownership of Stations, Limitations on
(See: Ownership Minority-*Amendment of Section 73.3555*)

(See: Ownership Monopoly-*Amendment of Section 73.3555*)

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(See: Common Carrier, Interconnection, Customer-Provided Equipment-*Com Services, Inc.*)

Programming
The Commission denied a petition for rulemaking seeking the adoption of a Commission rule to require the presidents (or vice-presidents) of the three commercial television networks to appear on their respective networks to explain their networks' programming policies to the public.
—*Programming Practices*

Programming Licensee Control of
(See: Programming-*Programming Practices*)

Qualifications, Comparative
(See: Comparative Criteria-*RKO General, Inc. (WYFR-FM)*)

Radio Frequency Device, Authorization
(See: Computing Device-*Amendment of Part 15*)

(See Also: Cordless Telephones-*Electra Co.*)

Rate Structure
(See: Common Carrier, Rates, Charges-*MTS Rates*)

Reciprocal Service
(See: Comparative Coverage Issue-*Caldwell Broadcasting Corp.*)

Reconsideration
Petition for reconsideration of *Hampshire County Broadcasting Co., Inc.* , FCC 84R-92, released December 14, 1984, denied.
—*Hampshire County B/cing Co., Inc.*
BC Docket No. 81-159

Reconsideration, Petition for, Denial of
Review Board denies reconsideration of its *Decision* , FCC 84R-87, released December 7, 1984. Crediting of applicant's upgraded comparative signal coverage from new transmitter site is controlled by *California Broadcasting Corp.* , 90 FCC 2d 800 (1982). One hundred percent minority enhancement credit outweighed 100% female enhancement credit plus "slight" comparative coverage preference.
—*Santee Cooper B/cing Co.*
MM Docket No. 83-158

Petition for special relief, reconsideration, and clarification of *South Florida Broadcasting Company, Inc.*, FCC 84R-89, released December 12, 1984, denied. Petitioner was directed to Section 1.245 of the Commission's Rules for specific procedures relating to the disqualification of a presiding officer.
—*South Florida B/cing Company, Inc.*
BC Docket No. 82-731

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(See: Deposition, Authority to Take-*Valley Broadcasters, Inc.*)

Rules, Amendment of
(See: Common Carrier, Accounting System-*Uniform System of Accounts*)

Rules, Waiver of
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Satellite Communications, Procurement
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—*Elimination of Part 25*
CC Docket No. 84-360

Satellite Earth Station, Joint Ownership of
(See: Common Carrier International-*INTELSAT*)

Satellite Station, Television
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Settlement
Review Board refers joint request for approval of settlement agreement filed by competing applicants to operating bureau. The agreement was contingent on Commission approval of two transfer applications, and referral of request would facilitate expedition and orderliness by permitting the request and transfer applications to be considered together.
—*Public Communications Foundation for North Texas*
BC Docket No.81-824

Short Spacings
(See: Antenna Farm-*Beasley B/cing of Phila., Inc.*)

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(See Also: Deposition, Authority to Take-*Valley Broadcasters, Inc.*)

Special Relief
(See: Deposition, Authority to Take-*Valley Broadcasters, Inc.*)

Strike Application
In hearing matter of mutually exclusive CP applications for new television stations, Review Board affirmed ALJ's grant. In so doing, the Board rejected a contention by losing applicant that winner had orchestrated challenge to its existing station to force it to drop out of the current comparative hearing.
—*Pueblo Broadcasting Corp.*
BC Docket No. 80-64

Tariff, Just and Reasonable Charges
(See: Common Carrier, International Record Carrier-*ITT World Communications, Inc.*)

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(See: Data Transmission-*Cable TV Systems*)

Telecommunications Service-Vertical Blanking Interval
(See: Data Transmission-*Cable TV Systems*)

Telephone Equipment, Registration of
(See: Common Carrier, Customer-Provided Equipment-*U.S. Transmission Systems, Inc.*)

Television, Low Power
The declaration of an applicant that it will remove a rule violation in its application by taking action in the future to improve the frequency stability of an existing station is not a basis for reinstatement of a low power television or television translator application.
—*Citizen TV Corp.*

Television-Vertical Blanking Interval
(See: Data Transmission-*Cable TV Systems*)

Teletext
(See: Data Transmission-*Cable TV Systems*)

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(See: Settlement-*Public Communication Foundation for North Texas*)

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(See: Television, Low Power-*Citizen TV Corp.*)

UHF Development Policy
(See: Ownership Minority-*Amendment of Section 73.3555*)

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Computing Device
Radio Frequency Device, Authorization

Order adopted amending Part 15 to modify the requirement that 49 MHz low power communication devices be self-contained. Part 15 provides for operation of low power communication devices in the 49 MHz band without individual license. Instant Order relaxes "self-contained" requirement, thereby allowing more flexibility in design of such devices, while still ensuring compliance with technical specifications designed to control interference.
—*Amendment of Part 15*

FCC 85-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Amendment of Part 15 to modify the requirement that 49 MHz low power communication devices be self-contained

ORDER

Adopted: January 11, 1985; Released: January 24, 1985

BY THE COMMISSION:

1. Sections 15.117 and 15.118 of Part 15 provide for operation of general purpose low power communication devices in the 49 MHz band without individual license. Equipment operating under these rules includes toy walkie-talkies and a variety of short-range radio control devices. Section 15.118(e) requires that the device be completely self-contained, with certain minor exceptions as discussed below. The Commission is receiving a growing number of requests for interpretation of the "self-contained" requirement and how it applies to specific types of devices.[1] It has become clear from these inquiries, that some types of equipment are precluded by the "self-contained" requirement, even though they otherwise are capable of satisfying the technical regulations designed to control interference. This *Order* partially relaxes the "self-

[1] Correspondence concerning the regulations for low power communication devices can be found in file 31030/EQU/4-2-4, located in the Office of Science and Technology, Technical Standards Branch.

contained" requirement, in such a way as to remove unnecessary constraints on the types of devices that might operate under the 49 MHz provisions.

2. The provisions for operation of low power communication devices in the 49 MHz band were adopted on February 4, 1976, by *Report and Order* in Docket No. 20119, released February 12, 1976, 41 FR 7394, February 18, 1976. The regulations were subsequently modified by *Memorandum Opinion and Order* adopted January 13, 1977, released January 19, 1977, 42 FR 4461, January 25, 1977. Operation was permitted on five specific 49 MHz frequencies as set forth in Section 15.117. Technical specifications designed to control interference were set forth in Section 15.118 and pertain to field strength of the signal at the carrier frequency, carrier frequency tolerance, field strength of spurious emissions, bandwidth of the transmitted signal, and levels of power line conducted emissions.

3. In addition to the technical specifications, a design requirement was set forth in subparagraph (e) of Section 15.118, which reads as follows:

> Section 15.118(e) - The device shall, with the exception of the microphone, be completely self-contained with the antenna permanently attached to the enclosure containing the device. The microphone may be external to the device, provided it is permanently attached to the enclosure with a cable not longer than 1.5 meters.

This requirement was rooted in the fact that the radiated signal from the device, and hence its interference potential, can increase by the attachment of an external antenna or reradiation from accessory cables. Also, there had been concern that the effective radiated signal strength might be increased by placing the antenna at a remote elevated location. The "self-contained" requirement has been interpreted to preclude such things as connectors for external input signals or connectors for accessories such as headsets (earpiece and microphone). Devices are permitted to operate from standard AC electric power, provided the power cord is permanently affixed to the unit. Provision for connection to a battery charger is permitted, on the condition that the transmitter must be designed so as not to transmit when in the battery charge mode.

4. Manufacturers have, over the years, received FCC equipment authorization for a variety of devices which satisfy the 49 MHz provisions, including walkie-talkies and radio control devices. However, manufacturers are more frequently describing ideas for products which are precluded by the "self-contained" design requirement, but allegedly could satisfy the technical requirements. For instance, several parties have expressed interest in transmitting data between computer equipment under these rules; however, since the "self-contained" requirement disallows external input signals, such operation is not feasible. It may be possible to design such a device to have reasonable assurance of compliance with the technical requirements irrespective of the type or length of the input cable

or characteristics of the input signal. In another instance, a manufacturer designed a short range walkie-talkie communication system for use by motorcyclists, where the "self-contained" requirement necessitated both the driver and passenger headsets to be connected to the transmitter by fixed connections. For safety reasons, this was an undesirable situation. It appeared that the intent of the rules could be satisfied by allowing use of plug-in jack connectors and testing the unit with the intended accessories.

5. It was not the intent of the "self-contained" requirement to artificially restrict the types of devices that might operate under the 49 MHz provisions. In fact, these provisions were intended to permit development of a broad range of general purpose low power communication devices. We believe, upon review, that the "self-contained" design requirement can be removed without compromising interference potential, provided that care is taken when performing compliance measurements to ensure that the technical specifications will be met under ordinary operating conditions. It is worth noting that, with the exception of cordless telephones, other Part 15 low power communication devices are not subject to a "self-contained" requirement, and this has not proven to be an impediment to compliance with the technical standards.[2]

6. Accordingly, we are amending Section 15.118(e), to delete the requirement that the device be self-contained and, in its place, adding a requirement that devices which provide for connection of accessories, including external input sources, be tested with accessories attached. We are also adding a statement that emissions tests shall be performed with the device and accessories configured in a manner which tends to maximize radiation, within the range of variations that can be expected under normal operating conditions. This is consistent with our measurement policy for other Part 15 devices. Section 15.118(b), which restricts emission bandwidth, is being amended to require that devices which provide for an external input signal be checked for compliance when modulated by the intended type of input signal.

7. We are retaining the requirement that the antenna be permanently mounted on the enclosure containing the device. The antenna plays a much more critical role in determining compliance than do accessory devices. Also, deletion of the present requirement would likely result in separate antennas being placed at elevated locations, which would greatly

[2] The "self-contained" requirement for cordless telephones is set forth in Section 15.233(e). Because the circumstances are different, we do not find cause to modify the "self-contained" requirement for cordless telephones. To begin with, we note that the "self-contained" requirement for cordless telephones contains additional language permitting use of certain accessories. Secondly, we are concerned that modifying the requirement in such a way as to permit separate input signals, as we are doing here, would open up the cordless telephone frequencies to a host of other types of devices, resulting in increased interference for cordless telephones.

increase the interference potential of these devices. While it is possible that, through use of a long microphone cable, the device itself might be placed at a high elevation, we consider this unlikely for a number of reasons, such as the practical need to have ready access to the equipment for repair, battery replacement, etc.

8. We do not believe that this rule relaxation raises any significant issues nor do we expect it to adversely affect any member of the general public. There would be little or no benefit in soliciting public comment in view of the minor nature of the change. Accordingly, as provided in Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), we find for good cause that public comment in this matter is unnecessary.

9. Authority for the amendment set out in the attached Appendix is contained in Sections 4(i), 302, and 303(r) of the Communications Act of 1934, as amended.

10. In view of the above, IT IS ORDERED that Section 15.118 of Part 15 is amended as set forth in the attached Appendix, effective March 4, 1985

11. For further information regarding this matter, contact Julius P. Knapp at (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 15 of the FCC Rules, 47 CFR 15.118, is amended as follows:

1. Section 15.118 subparagraphs (b) and (e) are amended to read as follows:

Section 15.118 *Technical specification for the band 49.82-49.90 MHz.*

* * * * *

(b) Emission shall be confined within a 20 kHz band centered on the carrier frequency. Devices that provide for an external input signal shall be checked for compliance with this requirement when modulated by the intended type of input signal.

* * * * *

(e) The antenna shall be permanently attached to the enclosure containing the device. If the device provides for connection of external accessories, including external electrical input signals, the device must be tested with accessories attached. The emissions tests shall be performed with the device and accessories configured in a manner which tends to produce maximized emissions within the range of variations that can be expected under normal operating conditions.

* * * * *

AM Station

Commission eliminated restrictions on AM carrier usage. AM licensees will now be able to use their carrier signals for any purpose providing such usage does create interference to originating or other stations. This action is similar to recent deregulation of FM and TV subcarrier use. AM band is therefore able to participate in the marketplace for carrier services heretofore provided by FM and TV subcarriers.

—*Amendment of Parts 2 and 73*
MM Docket No. 83-1322

FCC 84-301

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2 and 73 of the Commission's AM Broadcast Rules concerning the use of the AM carrier	MM Docket No. 83-1322 RM-4367

REPORT AND ORDER

Adopted: June 27, 1984; Released: August 14, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT AT A LATER DATE.

Introduction

1. By this *Report and Order,* we are expanding the uses permitted for the carrier signal of AM radio stations. AM licensees will now be able to use their carrier signals for any broadcast or non-broadcast use that does not interfere with their main broadcast channel operation or the signals of other broadcast stations. Prior to this action, the only permitted non-broadcast uses of the AM carrier were remote control telemetry and utility load management.

Background

2. On December 1, 1983, the Commission adopted a *Notice of Proposed Rule Making (Notice)* proposing to extend the uses of the AM

carrier signal.[1] To date, the only permitted non-broadcast uses of these signals were remote control telemetry and utility load management. In the *Notice,* the Commission suggested that no useful purpose is served by retaining restrictions on AM carrier use. The Commission further noted that because no additional spectrum is required to provide these new services, permitting such additional uses of AM carrier signals may result in more efficient use of the spectrum. The Commission also indicated that permitting AM broadcasters to utilize their carrier signals in this manner is consistent with the actions taken with regard to FM and TV aural subchannels.[2]

3. In the *Notice,* the Commission proposed that any method used for the provision of AM carrier services must not disrupt or degrade the main broadcast signal of the station or the signals of any other radio service. The Commission also indicated that specific technical standards were not required for the secondary use of AM carrier signals. Finally, the Commission requested comments on the regulatory approach to be taken with regard to AM carrier services. A total of nine comments and three reply comments were filed in response to the *Notice.* A list of the commenting parties appears as Appendix A.

Discussion

4. After reviewing the record in this proceeding, we believe that the Commission's goal of full and efficient use of the spectrum is furthered by permitting additional uses for AM carrier signals. We now believe that no useful purpose is served by the retention of the existing restrictions of utility load management and remote control telemetry. As the Altran Electronics Division of McGraw-Edison Co., Inc. (Altran) points out in its comments, limiting AM carrier use to utility load management leaves many potential carrier signals idle.[3] Further, by permitting additional secondary uses of the AM carrier, new and innovative services may be provided to the public without diminution of existing broadcast service.

5. We also believe that permitting AM stations to compete with FM and TV stations for business opportunities arising from multiplexing is beneficial. While there are significant technical differences between AM carrier signals and FM and TV aural subchannels that can preclude one

[1] See *Notice of Proposed Rule Making,* MM Docket No. 83-1322 (48 FR 56607) December 22, 1983.

[2] FM radio and TV broadcast licensees are currently permitted to use their subcarriers for broadcast and non-broadcast purposes. See *First Report and Order,* BC Docket No. 82-536 (48 FR 28445), June 22, 1983 and *Second Report and Order,* Docket No. 21323 (49 FR 18100), April 27, 1984.

[3] This is due to the fact there is generally only one utility company in any given area and therefore only one or two AM stations are likely to be involved in utility load management at any one time.

service from performing in the manner of the other, we believe that AM stations should have the opportunity to compete for those functions that can be provided by AM carrier signals. Giving AM broadcasters the opportunity to participate in this market should serve to reduce the costs of these services to the consumer and contribute to an overall healthy and competitive radio service environment. For the aforementioned reasons, we are amending our rules to permit AM stations to provide broadcast and non-broadcast services using AM carrier signals. By permitting any broadcast or non-broadcast use for AM carrier signals, we believe that AM licensees will be able to realize the most efficient and effective use of AM carrier services and that this will inure to the public's benefit.

6. *Technical matters.* In the *Notice,* we stated that any method used for the provision of AM carrier services must not disrupt or degrade the signal of the station or the signals of any other radio station. Specifically, we requested comments regarding what should be considered degradation or disruption of the main broadcast signal and to what extent should the Commission remain concerned about such degradation. In addition, we noted that while compatibility and interference concerns have been raised in the past, particularly with regard to AM stereophonic operations, AM broadcasters have strong market incentives to protect their own transmissions and install systems compatible with their primary broadcast operations.[4] No specific technical standards for AM carrier signals were proposed in the *Notice.*

7. NBC, Inc. (NBC), in its comments, supports the Commission's proposal that AM carrier signals should not be permitted to disrupt or degrade main channel programming or the signals of any other AM station. NBC believes that main channel integrity must be maintained and should not be compromised in any way. NBC states that the Commission should not permit the use of any AM carrier that results in any unrelated audible sound or tone during any main channel programming.[5] For example, audible AM carrier tones during main channel programming to activate non-broadcast services should not be permitted according to NBC.[6] Altran and the NAP Consumer Electronics Corporation (NAPCEC) suggest that AM licensees be allowed to determine the acceptabili-

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[4] In the AM Utility Load Management *Report and Order* in BC Docket No. 81-896 (47 FR 25342), June 11, 1982, the Commission alerted potential manufacturers and users of AM carrier systems of possible interference problems with AM stereo systems (see para. 15).

[5] In this regard, NBC proposes that the language suggested in the *Notice* be modified to indicate that AM broadcasters may transmit non-broadcast carrier signals not audible on "all receivers" rather than "ordinary consumer receivers."

[6] In the *Notice,* the Commission indicated that it had received a request from an AM station to permit the transmission of low-volume audible tones to activate teleprinters to disseminate information to the hearing impaired. A copy of this request had been placed in the docket file of this proceeding.

ty of their signals. These commenters state that if consumers are not satisfied with the signal of a radio station they will merely turn to another station that provides the level of service they desire. Altran also requests clarification regarding off-hour use of the carrier signal. Altran suggests that there is no reason why an AM station should not be able to transmit carrier signals during hours when they do not provide an audio service. CBS, Inc. (CBS) opposes carrier use during non-authorized hours of operation due to interference considerations. CBS states that restrictive power and hours of main channel operation for AM stations are there to protect other AM stations' main channel from possible interference.

8. Comments filed by Motorola, Inc. (Motorola) express concern over the effect of AM carrier signals on AM stereo operation. Motorola believes that the Commission should wait for the marketplace to decide on one of the competing AM stereo systems before it takes action on additional AM carrier use. At the very least, Motorola states that the Commission should draft rules that would protect stereo pilot tones from "falsing" on AM carrier signals.[7] The National Association of Broadcasters (NAB) and Altran suggest that marketplace incentives will overcome any signal integrity problems created by additional carrier use. These commenters state that AM broadcasters have strong motivations to protect their main channel operations and the AM band, in general, whether or not they choose to operate in stereo.

9. After reviewing the record, we conclude that our original proposal with regard to the provision of AM carrier services is appropriate. We will therefore amend our rules, as contained in the attached Appendix B, to allow any technical method for the provision of AM carrier services provided that such method does not disrupt or degrade the main broadcast signal of the station or signals of any other radio service. AM carrier services will be limited to the hours authorized for main channel operation. (It should be noted that carrier services may be provided during hours when the station is not providing an audio service but is authorized to operate.)[8] These constraints have worked well in the provision of remote control telemetry and utility load management services and we see nothing in the record of this proceeding to indicate that they will not do so under our expanded AM carrier authority. We believe that such an approach will provide broadcasters with wide latitude in the types of services that they may provide and significant technical flexibility in the

[7] Motorola is concerned that AM stereo receivers will "falsely" go into the stereo mode of operation when the station is not broadcasting in stereo due to the transmission of certain AM carrier signals. The current four AM stereo systems use subaudible pilot tones at 5, 15, 25 and 55 Hz.

[8] We believe that carrier operation outside authorized hours would have the same potential for creating interference as unauthorized main channel operation.

manner in which they can provide them. At the same time, AM broadcast service to the public will not be diminished.

10. With regard to AM stereo operations, we are aware that there may be certain compatibility problems associated with the use of AM carrier signals and AM stereo. As stated in the *Notice*, however, designers of AM carrier systems have marketplace incentives to build equipment that meets the needs of AM broadcasters (both stereophonic and monophonic). Likewise, AM broadcasters have strong incentives to protect their transmissions (as well as AM transmissions in general) and install systems compatible with their primary broadcast operations. We recognize the possibility that a station transmitting carrier signals may cause certain stereo receivers to switch into the stereo mode of operation when there is no stereo signal actually present (or for stereo receivers incompatible with the stereo system used by the station to switch into this incompatible stereo mode). Nevertheless, we do not find this situation so severe as to warrant either a delay in our authorization of additional uses for AM carrier signals or a requirement to protect the pilot tones of all AM stereo systems. We believe that the public benefits of additional carrier services outweigh any compatibility concerns that may arise. In this regard, we note that protection of AM pilot tones would severely inhibit AM carrier operations to the extent that it is doubtful that AM broadcasters could offer such services.[9] Furthermore, we note that certain compatibility problems already exist among AM stereo systems and that reception of one AM stereo system with a receiver designed for another type of AM stereo system may provide less than optimal performance.

11. In addition, to the degree that AM carrier signals may cause problems for AM stereo receivers, these problems already exist with the provision of utility load management and remote control telemetry operations. Our experience to date does not convince us that specific rules are required to resolve these problems. Further, we note that a number of AM stereo receivers are equipped with a switch to select monophonic or stereophonic operation. Selection of monophonic reception will eliminate any problems associated with reception of a station engaging in AM carrier service and not providing AM stereo. Finally, we agree with those who indicate that the AM licensee has strong marketplace incentives to provide adequate service and that if consumers are not satisfied with the signal of the radio station they will merely turn to another station that provides the level of service they desire. In implementing this decision, it

[9] AM carrier services, in general, would utilize subaudible signals for transmission. As noted previously, however, the four current AM stereo systems also make extensive use of subaudible pilot tones (at 5, 15, 25 and 55 Hz). Protection of these pilot tones would therefore eliminate a significant (if not all) portion of the subaudio band.

should be noted that complaints of interference to other services and with AM stereo receiver operation received by the Commission's Field Operations Bureau will be referred to the station licensee for resolution. The licensee will have the responsibility for resolving the problem to the complainant's satisfaction.

12. *Regulatory matters.* In the *Notice,* we proposed to follow the regulatory model set out in our *Report and Order* concerning the use of FM subchannels.[10] Briefly, we proposed to require that broadcast-related services such as subscription services using AM carrier signals remain subject to the control of the licensee. However, they would not be subject to the statutory requirements imposed on the licensee's main broadcast operations.[11] With regard to non-broadcast related uses of AM carrier signals, we proposed that it would be necessary to determine whether the service offered constitutes private or common carrier use under applicable statutes and case law.[12] Once a licensee has determined that the service is common carriage, authorization would be sought to provide that service from the Common Carrier Bureau and state commissions, as appropriate. For AM licensees seeking to provide private services, we proposed that they notify the Commission's Private Radio Bureau and certify compliance with pertinent private radio regulations.

13. In general, the commenters support this approach. Several commenters suggest, however, that the Commission should forebear from applying common carrier regulation to AM carrier use. NBC, for example, states that AM carrier services should be classified as "hybrid" and therefore subject to minimal regulation. NBC claims this action would be consistent with the Commission's *SBS* holding and would generally fall under a "point-to-point" service category.[13] The NAB states that AM carrier operation should not be subject to separate application or licensing

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[10] See *First Report and Order,* BC Docket No. 82-536 (48 FR 28445), June 22, 1983, at para. 20-27 and *Memorandum Opinion and Order,* BC Docket No. 82-536, released May 2, 1984.

[11] See *Report and Order,* BC Docket 81-741 (48 FR 27054), June 13 1983.

[12] The determination as to the appropriate regulatory classification of AM carrier service would rest, in the first instance, with the licensee, guided by the standards articulated in applicable judicial decisions and statutory provisions. Specifically, assuming there is no legal compulsion requiring operation as a common carrier, a finding of common carrier status would generally turn on whether a particular entity actually operates as a common carrier, that is, whether the carrier "undertakes to carry for all people indifferently." See *National Associations of Regulatory Utility Commissioners* v. *FCC* , 525 F. 2d 630 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 992 (1976) ("NARUC I") and *Report and Order* in BC Docket No. 82-536, *supra* at paras. 21-22. For mobile radio services, Section 331(c) of the Act shall apply. See *Report and Order,* BC Docket No. 82-536, *supra* at para. 23.

[13] See *Satellite Business Systems,* File No. 1091-DSS-MP/ML-83, FCC 83-403 (Released November 2, 1983).

procedure, logging requirements, political broadcast rule, fairness doctrine or other programming regulation applied to conventional broadcasting. NAB also does not want the determination of the regulatory class of the carrier left to the licensee. Bonneville International Corp. (Bonneville), and the National Radio Broadcasters Association (NRBA) join NAB and NBC in stating that the Commission can and should forebear from applying common carrier regulation on carrier use. NAB, NBC and Bonneville also request that the Commission preempt state and local entry regulation. They claim that AM carrier services classified as common carrier services would be subject to varying state and local regulations which would act to discourage entry into this area by AM licensees. On the other hand, the Joint Telephone Companies, in their comments, support having common carrier regulation apply to AM carrier use. They claim that this action would be consistent with other subcarrier uses and that if broadcasters are exempt from such regulation, telephone companies offering similar services would be put at a competitive disadvantage.

14. After review of the record, the Commission believes that the regulatory approach set forth in the *Notice* is the appropriate one to follow. We disagree with NAB that the determination of whether the service provided by AM carrier signals is common carrier or private is an unreasonable burden to place on the licensee. Further, the Commission is unpersuaded by those who contend that services provided by AM carrier signals should be exempt from all regulations. We believe that the minimal requirements we are adopting herein are necessary to carry out our responsibilities under the Communications Act and will not place an unreasonable burden on those wishing to implement AM carrier services.

15. AM carrier services will be regulated in the same manner as TV aural subchannel and FM subcarrier uses.[14] Subscription programming services will not be considered broadcasting but will remain under the licensee's control unless offered on a common carrier basis. For non-broadcasting services, the AM licensee determines whether the service offered constitutes private or common carrier use under applicable statutes and case law.[15] The licensee then either seeks appropriate authorization if the service is common carriage or complies with the

[14] Thus, for example, the fairness doctrine and equal time requirements will not be applicable to AM subcarrier services. See e.g., *Second Report and Order,* Docket No. 21323, *supra* at para. 26.

[15] An AM licensee may also choose to lease the use of its AM carrier to an entity that will provide a private or common carrier service. In such cases, the lessee or the lessor may seek appropriate service authorization. However, the primary licensee remains responsible for the technical operation of the transmitting facilities, including the use of the AM carrier signals.

simple notification and certification requirements for private services.[16] It should be noted, that applicants for use of AM carrier signals will not be seeking approval for the technical facilities of the AM station. The technical facilities are appropriately considered in the context of the station's primary purpose of broadcasting and these facilities would not be subject to challenge or modification on the basis of proposed, secondary carrier activities. AM carrier use will be considered as a secondary privilege that runs with the primary broadcast station license.

16. We indicated in the *Notice* and are adopting herein the regulatory model used for FM subchannel services. On April 26, 1984, the Commission adopted a *Memorandum Opinion and Order (MO&O)* in BC Docket No. 82-536 that *inter alia* preempted state regulation that has the effect of prohibiting or impeding entry of radio common carrier services offered on FM subcarriers.[17] In the *MO&O,* the Commission noted that comparable kinds of communications, with some technical variations, may also be distributed using the ancillary communications capability of other broadcast media. In particular, the *MO&O* stated that the resolution of the preemption issue with respect to FM subchannels would cover TV subchannels as well. In this proceeding, similar issues have been raised concerning certain state and local entry requirements. We believe that these entry restrictions will frustrate our legitimate efforts to foster efficient utilization of the spectrum and conflict with our pro-competitive spectrum allocation policies.[18] Accordingly, as with FM subchannel use, we are preempting state regulations that have the effect of prohibiting or impeding entry of radio common carrier services provided by AM carrier signals.

17. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

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[16] AM broadcast licensees seeking to provide private carrier services must simply notify the Licensing Division of the Private Radio Bureau in Gettysburg, Pennsylvania, by letter certifying that their facilities will be used only for permissible purposes under 47 CFR Parts 90 and 94 of the rules. They must also certify that any interconnection of the station with a telephone exchange or interexchange service will be obtained in accordance with Section 331 of the Communications Act. The letter of notification is all that is required to be sent to the Commission. There are no application forms, and separate licenses will not be issued. In addition, the letters of notification do not give rise to any comment period or petitions to deny. Private systems operating on AM carrier signals are exempt from state and local regulation in accordance with §331(c)(3) of the Communications Act.

[17] See *Memorandum Opinion and Order,* BC Docket 82-536 (49 FR 19659), released, May 2, 1984.

[18] For a more complete treatment of our preemption of state and local entry regulation see *Memorandum Opinion and Order, supra.*

I. Need for and purpose of the rules.

The Commission believes that limiting AM carrier use to remote control telemetry and utility load management does not comport with the goal of maximizing efficient utilization of the spectrum. The restrictions also artificially restrict competition in business opportunities arising from carrier use. Therefore, the Commission is allowing additional uses for the AM carrier as long as such uses do not create interference to main channel operation of either the originating station or other stations.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment and changes made as a result.

A. Issues raised.

No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. All commenters supported relaxation of the restrictions on AM carrier use to some degree. Most supported unrestricted use of carrier signals. One commenter, however, was concerned about additional carrier use creating problems for the fledgling AM stereo industry.

B. Assessment.

The Commission believes that market forces will mitigate any problems with AM stereo operation. Further, to the degree that this remains a problem, the Commission believes that the benefits of additional AM carrier use outweigh these concerns.

C. Changes made as a result of such comments.

None.

III. Significant alternative considered and rejected.

The Commission considered the following alternatives: (1) to not allow other uses for AM carrier signals; and, (2) to allow other uses but fashion rules to protect AM stereo pilot tones. The Commission feels that the first alternative would not allow the full potential benefits of unrestricted carrier use to accrue to AM licensees and those who use carrier/subchannel services. The Commission also believes marketplace incentives will protect AM stereo pilot tones without Commission mandates. Therefore both options were rejected.

18. Authority for amending the rules is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

19. Accordingly, IT IS ORDERED, that Parts 2 and 73 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective September 20, 1984.

20. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of the *Report and Order,* including the regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164. 50 U.S.C. §601 *et seq.*) (1982).

21. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

* Appendix A — May be seen in FCC Dockets Branch, 1919 M Street, N.W. Washington, D.C.

APPENDIX B

Parts 2 and 73 of the Title 47 of the Code of Federal Regulation's are amended as follows:

A. Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

1. Section 2.106, the National Table of Frequency Allocations, is amended by changing footnote NG128, in the list of footnotes following the Table to read as follows:

NG128 In the band 535-1605 kHz, AM broadcast licensees or permittees may use their AM carrier on a secondary basis to transmit signals intended for both broadcast and non-broadcast purposes. In the band 88-108 MHz, FM broadcast licensees or permittees are permitted to use subcarriers on a secondary basis to transmit signals intended for both broadcast and non-broadcast purposes. In the bands 54-72, 76-88, 174-216 and 740-890 MHz, TV broadcast licensees or permittees are permitted to use subcarriers on a secondary basis for both broadcast and non-broadcast purposes.

2. In Section 2.1001, paragraph (h) is revised to read as follows:

§2.1001 Changes in type accepted equipment.

* * * * *

(h) The interconnection of a multiplexing exciter with a type accepted AM broadcast transmitter in accordance with the manufacturer's instructions without electrical or mechanical modification of the transmitter circuits and completion of equipment performance measurements showing the transmitter meets the minimum performance requirements applicable thereto is defined as a Class I permissive change for compliance with this Section.

B. Part 73 - Radio Broadcast Services

3. Section 73.127 is amended by revising the introductory paragraph, paragraphs (b) and (c) and by adding paragraphs (d), (e) and (f) to read as follows:

§73.127 Use of multiplex transmissions.

The licensee of an AM broadcast station may use its AM carrier to transmit signals not audible on ordinary consumer receivers, for both broadcast and non-broadcast purposes subject to the following requirements:

* * * * *

(b) AM carrier services that are common carrier in nature are subject to common carrier regulation. Licensees operating such services are required to apply to the FCC for the appropriate authorization and to comply with all policies and rules applicable to the service. Responsibility for making the initial determinations of whether a particular activity is common carriage rests with the AM station licensee. Initial determinations by licensees are subject to FCC examination and may be reviewed at the FCC's discretion. AM carrier services that are private carrier in nature must notify the Licensing Division of the Private Radio Bureau at Gettysburg, Pennsylvania, 17325, by letter, prior to initiating service certifying compliance with 47 CFR Parts 90 and 94.

(c) AM carrier services are of a secondary nature under the authority of the AM station authorization, and the authority to provide such communications services may not be retained or transferred in any manner separate from the station's authorization. The grant or renewal of an AM station permit or license is not furthered or promoted by proposed or past service. The permittee or licensee must establish that the broadcast operation is in the public interest wholly apart from the subsidiary communications services provided.

(d) The station identification, delayed recording, and sponsor identification announcements required by §73.1201, 73.1208, and 73.1212 are not applicable to leased communications services transmitted via services that are not of a general broadcast program nature.

(e) The licensee or permittee must retain control over all material transmitted in a broadcast mode via the station's facilities, with the right to reject any material that it deems inappropriate or undesirable.

(f) Installation of the multiplex transmitting equipment must conform with the requirements of §73.1690(e)(6).

2. In Section 73.1690, subparagraph (e)(6) is amended to read as follows:

§73.1690 Modification of transmission systems.

* * * * *

(e) * * *

* * * * *

(6) Modification of the transmitter for multiplexing of the carrier with an exciter unit that has been designed for interfacing with the type accepted transmitter with which it is to be used in accordance with the following:

(i) The combination of the multiplexing exciter and transmitter meets the minimum specifications given in §§73.40 and 73.44.

(ii) The frequency stability requirements of §73.1545(a) must be maintained.

(iii) No electrical or mechanical changes in the transmitter circuits are allowed.

* * * * *

June 27, 1984

STATEMENT OF COMMISSIONER HENRY M. RIVERA DISSENTING IN PART

RE: Amendment of Parts 2 and 73 of the Commission's AM Broadcast Rules Concerning the Use of the AM Carrier

I dissent from that part of the majority's decision that preempts state entry regulation of interstate ratio services operating on the AM subcarrier for the same reasons I dissented from the Commission's preemption of state entry regulation of FM subcarrier services.[1] Similarly, I dissent from the majority's decision to classify all uses of the AM subcarrier as "ancillary" and, thus, to exempt broadcast uses of this radio service from Title III obligations for reasons outlined previously.[2]

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[1] I believe that the Communications Act prohibits preemption. *Memorandum Opinion and Order,* BC Docket No. 82-536 50 Fed. Reg. 6177 (February 14, 1985) (Statement of Commissioner Henry M. Rivera, Dissenting in Part.)

[2] *See generally,* Remarks of Commissioner Henry M. Rivera before the American Law Institute-American Bar Association, The New Regulatory and Technological Framework, March 29, 1984; *National Association of Broadcasters* v. *FCC,* No. 83-1926 slip op. at 13-27 (D.C. Cir. July 27, 1984); *United States Satellite Broadcasting Co.* v. *FCC,* No. 83-1692 slip op. at 19-20 (D.C. Cir. July 24, 1984). I especially object to the conclusion, in note 14 of this *Report and Order,* that the fairness doctrine and equal time requirements will not apply. *See Second Report and Order,* Docket No. 21323, 55 RR 2d 1642 (April 23, 1984) (Statement of Commissioner Henry M. Rivera, Dissenting in Part).

Ownership Monopoly
Ownership of Stations, Limitations on

The Commission has established new transitional multiple station ownership regulations for broadcast facilities. Group owners will be allowed to have cognizable interests in a maximum 12 AM, 12 FM and 12 TV stations. The transitional rule adopted herein will sunset automatically six years from the effective date of the *Report and Order.*

—Amendment of Section 73.3555
Gen. Docket No. 83-1009

FCC 84-350

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations.	Gen. Docket No. 83-1009

REPORT AND ORDER
(Proceedings Terminated)

Adopted: July 26, 1984, Released: August 3, 1984

BY THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN; AND PATRICK ISSUING SEPARATE STATEMENTS; COMMISSIONER DAWSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A FULL TEXT STATEMENT.

I. Introduction

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding (Gen. Docket 83-1009, released October 20, 1983, 48 Fed. Reg. 49438), and the voluminous comments and reply comments filed by interested parties.

2. This Rulemaking addresses the Commission's Seven Station Rule, which prohibits persons from holding cognizable ownership positions in more than seven AM, seven FM and seven TV stations (of which no more than five may be VHF Stations). This rulemaking does not affect the Commission's Duopoly Rules[1] or the companion One to a Market Rule.

3. The stated purpose of the rule when it was adopted was twofold: (1) to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and (2) to safeguard against undue concentration of economic power.

4. Since the rule as adopted over three decades ago, the nature and scope of broadcasting in the United States has experienced an enormous transformation. The mass media market *in toto* likewise has witnessed explosive growth and change. The number of on-the-air radio stations has tripled to over 9000, and the number of television stations has risen from 199 to 1,169. Additionally, cable television service is now available to 64 percent of all television households through more than 6,400 different systems, and new technologies and services such as MDS and LPTV are adding more diversity and competition to mass media markets. Equally important, there has been increasing question as to whether a national ownership rule is relevant to or indeed fosters the Commission's dual goals of promoting diversity and competition. These changes and concerns caused the Commission to issue a Notice of Proposed Rule Making to examine the wisdom of altering the Rule of Sevens.

5. Nevertheless, we recognize that some commenters believe a significant and rapid restructuring of the broadcast industry might occur if the rule is repealed immediately in its entirety. While we do not believe that repeal will result in any harmful restructuring of the industry, we are sensitive to their concern that if all restrictions were removed immediately then structural changes might occur before the full ramifications of these changes became evident. Therefore, out of an abundance of caution, the Commission is establishing a transitional limitation for a period of six years during which multiple station ownership in each broadcast service will be capped at a numerical limit of 12. Six years from the effective date of this Order, this transitional limitation will expire unless experience shows that continued Commission involvement is warranted, in which case corrective action will be taken. In any case, the Commission will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particularly those related to diversity[2] and competition.

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[1] *See* para. 12, *infra,* and accompanying notes.

[2] Diversity is also considered by the Commission in the granting of new licenses and has substantial weight in comparative proceedings.

6. As discussed in detail below, our action is based upon several grounds. To the extent the rule was intended to ensure diversity of viewpoints, changes in the broadcasting and communications markets, new evidence of the effects of group ownership on the quality and quantity of public affairs and other programming responsive to community needs, and the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets lead us to conclude that the rule is unnecessary to achieve that objective; indeed the rule may be an obstacle to the broadcast of the types of programming that might more adequately address the interests and concerns of the public.

7. The Commission's initial decision to restrict multiple ownership implicitly relied on traditional scarcity arguments—that broadcast stations were sufficiently limited in number that regulation was necessary to eliminate the possibility of "monopolistic" control, and that the limited frequencies as compared to the numerous applicants justified restrictions on ownership. This rationale as a basis for continued regulation, however, fails to recognize several important points. First, improvements in technology and changes in spectrum regulation accompanied by expanding audience and advertising markets have eliminated monopolistic control as a serious threat. The number of broadcast stations has increased more than tenfold since the initial multiple ownership rules were adopted. And raw numbers of stations tell only part of the story. FM radio stations and UHF television stations have emerged as thriving rivals of other broadcasting outlets. Existing stations of all types, moreover, continue to improve their transmission facilities and thereby increase the service to which the public has real access. As a consequence, reliance on scarcity of broadcast service in any absolute sense, and certainly in comparison with daily newspapers, is increasingly anachronistic. Second, and equally important, the fact that there are more who would like to operate broadcast facilities than can actually do so, while undeniably true, fails to distinguish broadcasting in any practical sense from other businesses, including particularly the nonbradcast media, for which resources are limited or the available economic base constrains the number of firms that can successfully participate in the market. A federal license is needed to enter broadcasting, which is not the case in the newspaper industry. But because broadcasting stations can be purchased,[3] typically the only genuine barrier to entry into broadcasting is insufficient capital, as is the case regarding entry into the newspaper

[3] A staff tabulation shows that as of 1983, 54 percent of television stations and 71 percent of radio stations had changed hands in this way. See "Television and Radio Licenses: Original Grant or Purchased," memorandum from Michele M. Harding to Chief, Office of Plans and Policy, August 16, 1983.

field. A substantial number of incumbent broadcasters have entered the industry through station acquisitions.

8. To the extent that the Rule rests upon a premise that broadcasters should be subject to regulatory constraints because of a "unique" power to influence or persuade, and therefore to manipulate the nation's political process—a view that ignores the multitudinous alternative outlets for the expression of ideas and the diversity of conflicting opinions and ideas among broadcast outlets themselves—we have grave doubts that such a notion can withstand scrutiny on constitutional grounds. The fact that the government may fear the persuasive power of this organ of the press does not mean that the First Amendment allows it to act on those fears.[4]

9. Apart from our recognition of fundamental changes in the broadcast marketplace and in our perceptions of the "scarcity" and "uniqueness" doctrines, new information also causes us to reevaluate some of the basic assumptions underlying the Rule and its relationship to viewpoint diversity. Evidence in this proceeding suggests that group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions. Thus, it appears that Commission policy founded on the purported dangers of group ownership in terms of a restraint on the diversity of ideas available to the country may have been based in large degree upon a false assumption. Statistical evidence adduced in the record of this proceeding, set out more fully at para. 45-47 below, shows that group owners broadcast more issue-oriented programming than non-group-owned stations. Because of this it may be said that group ownership actually furthers, rather than frustrates, the foremost First Amendmant goal of augmenting popular discussion of important public issues. These benefits of group ownership provide an important basis for our decision to eliminate the Rule.

10. Further, whereas the Rule imposes a national ownership limit, we believe that the more correct focus for addressing viewpoint diversity and economic competition concerns is the number and variety of information and advertising outlets in local markets, a matter that is not addressed by a nationwide restriction on ownership.

II. Historical Background

11. The genesis of the Seven Station Rule has been set forth in detail at paras. 2-24 of the *Notice* and need not be discussed extensively herein. For purposes of general summary, however, we will reiterate the salient steps in the Commission's development of the rule.

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[4] See *Buckley* v. *Valeo*, 424 U.S. 1 (1975); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1977).

12. As the Notice points out, the FCC's first interest in multiple ownership came in the area of duopoly, the term the Commission has applied to "common ownership of more than one station in the same service in a particular community."[5] The Commission in 1938 adopted a strong presumption against granting licenses which would create such duopolies, based largely on the perceived virtues of "diversification of service."[6] This presumption against duopoly ownership became an absolute prohibition when the Commission adopted rules governing commercial FM service in June, 1940.[7] To reiterate, we do not propose to change this rule.

13. The commercial FM rules also contained the Commission's first restrictions on ownership based not on the location of the broadcasting stations but rather simply on the number of stations under common ownership. The FCC adopted a "six station rule" prohibiting an owner from owning more than six FM stations. Further, applicants who already owned stations would be required to prove that their ownership of additional stations "would not result in the concentration of control of high frequency broadcasting facilities in a manner inconsistent with the public interest, convenience and necessity."[8] The purpose of these rules was stated to be "[t]o obviate possible monopoly, and encourage local initiative."[9]

14. The infant television industry was regulated by a similar set of rules in 1940, but the limit on the number of stations under common ownership was set at three on the unedifying rationale that "the more limited television channels make three such stations the limit for the main

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[5] *Notice*, 48 Fed. Reg. 49438.

[6] The Commission's duopoly policy was stated in *Genesee Radio Corp.*, 5 F.C.C. 183 (1938). For more general background information, *see* H.H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 Fed. Comm. B.J. 1 (1974) and L.A. Powe, Jr., *FCC Determinations on Networking Issues in Multiple Ownership Proceedings* (Network Inquiry Special Staff Preliminary Report on Prospects for Additional Networks) (February 1980).

[7] See Federal Communications Commission, *Sixth Annual Report* Fiscal Year 1940 (1941) at 68. In 1968 the Commission issued a *Notice of Proposed Rulemaking* indicating a desire to broaden the duopoly rules by restricting broadcast licensees to one full time station of any type per market. *Notice of Proposed Rule Making*, Docket 18110, 33 Fed. Reg. 5315 (1968). This rule making was initiated to "promote diversity in the viewpoints expressed over the air in individual localities." *Id.* This "one to a market" proposal was adopted by the Commission in modified form in 1970, *First Report and Order*, Docket 18110, 22 FCC 2d 306 (1970), and further altered in 1971, *Memorandum Opinion Order*, Docket 18110, 21 P&F Radio Reg. 1551 (1971). The formation of new radio-VHF television combinations in the same market is prohibited although radio-UHF combinations may be approved on a case by case basis and there is no bar to AM-FM combinations.

[8] *Rules Governing High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (1940).

[9] Federal Communications Commission, *Sixth Annual Report* 68 (FY 1940) (1941).

television band."[10]

15. Having limited the number of stations which any one owner could operate in the new FM service and in the experimental television service, the Commission extended those limits to the more established AM service in 1946 by creating a *de facto* limit of seven.[11]

16. At this point the Commission's move towards an absolute numerical limit of stations under common ownership, without regard to population served, size of station, or changes in the media market, was clear.[12] This policy was formalized as the current Seven Station Rule through a rulemaking proceeding initiated in 1948. The Commission began the process with a *Notice* ,[13] and solicited comments and held oral argument. In November of 1953 the Commission formally adopted a seven station limit for AM, raised the existing six station limit for FM to seven, and retained the existing five station TV limit[14] (which within a year was raised to seven, no more than five of which could be VHF).[15]

17. The Commission stated that it adopted the Seven Station Rule [16] in

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[10] Federal Communications Commission, *Seventh Annual Report* 34 (FY 1941) (1941). For a discussion of the imposition of these early limits on multiple ownership in the television industry, *see* H.H. Howard, *supra* note 3, at 8. The number of television stations which could be held under common ownership was raised to five in 1944. Rules Governing Broadcast Services Other Than Standard Broadcast, 9 Fed. Reg. 5442 (1944).

[11] The Commission denied CBS' application to purchase an eighth AM station, KQW in San Jose, California, indicating in its decision that the company had already reached the full complement of stations the Commission would allow it to have.

[12] This regulatory policy was questioned by Senator Wallace White, the Chairman of the Committee on Interstate and Foreign Commerce, who introduced legislation in 1947 to bar the use of numerical national ownership ceilings. White instead proposed limiting common ownership to stations "which in the aggregate provide a primary service . . . for more than 25 percentum of the population of the continental United States as determined in the last preceding decennial census." S. 1333, 80th Cong., 1st Sess. (1947). The Commission opposed the proposal, arguing *inter alia* that it was "not conducive to the prevention of monopoly." *To amend the Communications Act of 1934: Hearings Before a Subcomm. and Foreign Commerce on S. 1333,* 62-63, 70, 80th Cong., 1st Sess. (1947). The proposed legislation died in Committee.

[13] *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* 13 Fed. Reg. 5060 (1948). The Commission then froze all television applications pending the revision of the table of television assignments, which had the effect of holding back the tremendous expansion of television service and surge of new licenses until after the Rule of Sevens proceeding was virtually complete.

[14] *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations,* 18 F.C.C. 288 (1953).

[15] This action was taken to encourage the development of UHF stations, which were then just becoming available in the marketplace.

[16] The Commission in its *Report and Order* explicitly rejected "any proposal to limit multiple ownership on the basis of such factors as class of station or geographic location" stating that such proposals were either "unsatisfactory or unworkable."

order to further its policy of "diversification" and to "implement the Congressional policy against monopoly." The Commission elaborated on these two themes, saying that the fundamental purpose of its new national ownership rules was both "to promote diversification of ownership in order to maximize diversification of program and service viewpoints" and to "prevent any undue concentration of economic power contrary to the public interest."[17] These two theories—the need for diversity of programming and editorial viewpoints, and the need to ensure that no competitive harm occurs—are the two explicit rationales for the Commission's Seven Station Rule.

18. Since 1954 the Commission has several times revisited the Seven Station Rule, but only to question whether an absolute numerical limit, rather than geographic or nature of service limits, was the most appropriate form of regulation.[18]

III. Discussion of the Issues

19. The Commission not only has the authority to reexamine long-standing rules as circumstances change, but is virtually required to do so in order to ensure that it continues to regulate in the public interest. [19] As the Supreme Court has stated, "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed the Commission will act in accordance with its statutory obligations."[20] It has been over thirty years since the Seven Station Rule was adopted, and we believe that changed circumstances, as well as new information bearing on the purposes and effects

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Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations, supra notes 11-13.

[17] *Id.* at 292-293.

[18] *See* H.H. Howard, *supra* note 5 at 19-31; the "Barrow Report," published as *Network Broadcasting: Report of the Committee on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. (1958).

Concern about the possibility of excessive concentration in major markets led the Commission to propose a series of restrictions on the ownership of multiple VHF stations in the top fifty markets. *Hearings on Applications for Second VHF Stations,* 3 R.R. 2d 909 (1964); *Interim Policy Concerning Acquisition of Television Broadcast Stations,* 5 R.R. 2d 271, 272 (1965) and *Multiple Ownership of TV Broadcast Stations,* 22 F.C.C. 2d 686 (1968). Attempts to formulate such restrictions ended in 1979, when the Commission found there was insufficient ownership concentration to justify them. *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations),* 75 F.C.C. 2d 585 (1979), *recon. denied,* 82 F.C.C. 2d 329 (1980), aff'd sub. nom. *National Association for the Advancement of Colored People v. FCC,* 682 F. 2d 993 (D.C. Cir. 1982).

[19] *Geller* v. *FCC,* 610 F. 2d 973, (DC Cir., 1979).

[20] *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225 (1943). *U.S.* v. *Storer Broadcasting,* 351, U.S. 192, 205 (1955).

of the rules, now justify its repeal. These issues, as they relate both to television and radio broadcast services, are discussed below.

20. In our *Notice of Proposed Rulemaking* we noted that the Rule of Sevens had been adopted for two purposes: to encourage diversity of programming and the expression of a variety of viewpoints, and to safeguard against an undue concentration of economic power. The Commission adopted the rule on the basis of prognostication, not empirical proof, and relied on assumptions which at the time were untestable. That the Seven Station Rule promotes or is integral to genuine diversity in the expression of viewpoints, and prevents anticompetitive activity, was assumed, but this assumption was not based on hard evidence in the record.

21. Thirty-one years have elapsed since the Rule was adopted. We have adduced, in our *Notice* in this proceeding, a number of developments and changes in broadcasting over the course of those years. Commenters in this proceeding have thoroughly examined the state of today's broadcast market, focusing not only on competitive concerns, but also on essential questions concerning viewpoint diversity. As a result of these efforts, the Commission has before it a full and persuasive record on the effect of its Seven Station Rule.

22. This information enables the Commission to consider carefully the degree to which the broadcast market has changed since the Rules were adopted, and the effect of those changes on the Commission's regulatory goals and methods. Because there was no historical record of the procedures and performance of the infant television industry in 1953, the Commission can now consider these data for the first time. We therefore have examined in this proceeding the evidence of vast changes in broadcasting, as well as the potential for further developments through new technologies. Further, we have considered evidence in the record which indicates that the Commission in the past failed to recognize some of the advantages of group ownership and overestimated the potential dangers of such ownership. The record in this proceeding accordingly allows us to reexamine not only the state of the market, but also some of the basic assumptions which guided our decisions in 1953.

23. In the course of this reexamination, we will discuss the effect of eliminating the Seven Station Rule on, first, diversity of viewpoint in today's information market, and second, economic competition in the marketplace. Then we will consider two other issues, the effect on minority participation in broadcasting and treatment of the three television networks.

A. Viewpoint Diversity

24. A primary goal of the Commission in adopting the Rule of Sevens was to encourage a diversity of independent viewpoints. In order to

analyze the effect of eliminating this rule on viewpoint diversity, it is necessary to determine what types of mass media provide reasonable alternatives to TV and radio stations; from what geographic area, local or national, are consumers able to select these mass media alternatives; and what effects group ownership might have on an individual station's contribution as a source of its community's information and entertainment. We consider these questions in detail below. In brief, we conclude that a national rule is irrelevant to the number of diverse viewpoints in any particular community and that even if we believed that radio and television were the only media relevant to diversity of viewpoint, the phenomenal growth in both television and radio since the rule was adopted in 1953 provides sufficient basis for raising the 7 station limit. Indeed, a 12 station owner today would own proportionately fewer stations than did a 7 station owner in 1953. Our conclusion to modify the rules is made even more compelling, however, when other mass media relevant to diversity of viewpoint are considered.

1. The Mass Media Relevant to Viewpoint Diversity

25. The record in this proceeding supports the conclusion that the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media as well. In the *Notice* we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is, cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[21] With regard to this issue, some commenters argue that "[i]n America as a whole, there are literally countless independently-owned press outlets and groups of press outlets . . ." citing in particular the "more than 10,000 American broadcast stations, owned by at least 3,800 different firms; 1,711 daily newspapers, owned by a total of 682 firms; 4,791 cable systems (as of 1982), owned by 1,309 firms; 1,500 consumer magazines owned by 1,110 firms; 4,742 non-daily newspapers and 4,507 other periodicals owned by innumerable firms."[22]

26. These figures were presented as part of CBS's argument that, in terms of diversity, "the relevant consideration . . . is the number of separately-owned press outlets, rather than the relative circulations of the outlets." This is so, the commenter maintains, because the purpose of the multiple ownership rules is to maintain a diversity of independent viewpoints "in the nation's overall intellectual marketplace." "Every press outlet," CBS contends, "—ranging from sidewalk leafleteers to tiny 'underground' newspapers to iconoclastic journals to mass circulation

[21] *Notice*, 48 Fed. Reg. 49447.

[22] *Comments of CBS, Inc.* at 28.

print and electronic outlets—makes an important contribution to the stimulation of society's collective thought process."[23]

27. The very existence of this plethora of mass media outlets and the broad spectrum of media alternatives that CBS cites suggests that consumers patronize numerous alternative sources of information and entertainment. Moreover, while it is often asserted that television is a unique source of information, we believe that that product definition is too narrow.

28. In this regard, there is empirical evidence discussed in the FCC staff report filed in this docket which supports this conclusion.[24] A Roper organization poll suggests that the various media are substitutes in the provision of news. In 1981, when asked to list primary news sources, 64 percent of those surveyed listed television, 18 percent listed radio, and 44 percent listed newspapers.[25] The fact that the respondents often listed more than one choice implies that many people actually use more than one medium as a news source. Even those who do not do so could turn to an alternative medium if they became dissatisfied with their current one. Another study challenges the conventional wisdom that Americans acquire most of their news from television. Using data collected by the Simmons Market Research Bureau, University of Maryland mass communications professor Lawrence Lichty shows that 68 percent of U.S. adults read at least part of a newspaper every day, while fewer than one-third watch television news, local or national, on a given day.[26]

29. We also believe that this Commission's longstanding concern with media crossownership in a given local market, discussed at para. 12 above, supports an expansive definition of the media which comprise the information market. Prohibition of cable and television, newspaper and television, and radio and television cross ownership in the same market would make little sense unless these different media were important substitutes for each other.[27]

30. We conclude that, in terms of viewpoint diversity, the market includes a wide variety of active, energetic organs engaged in the dissemination of ideas, and that these instruments include not simply television and radio, but also cable, video cassette recorders, newspapers, magazines, books, and, when they are in operation, MDS, STV, LPTV and

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[23] *Id.* at 26.

[24] J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets,* Office of Plans and Policy, FCC, December 23, 1982.

[25] *Broadcasting,* 15 November 1982, p. 94.

[26] Lawrence W. Lichty, "Video versus Print," 6 *The Wilson Quarterly* 48-57 (Special Issue, 1982).

[27] See *Second Report and Order* in Docket No. 18397, 23 FCC 2d 816 (1970) for the television-cable rule and *Second Report and Order* in Docket No. 18110, 50 F.C.C. 2d 1046, 1083 (1975) for the newspaper-broadcast station rule.

DBS, all of which should be considered when evaluating diversity concerns.

2. The Geographic Markets Relevant to Viewpoint Diversity

31. The area from which consumers can select the relevant mass media alternatives is generally the local community in which they work and live. Radio and TV signals are available over the air in generally discrete local markets. Consumers also have recourse to local outlets for other material, such as newspapers, magazines, videocassettes, records, and movies.

32. It is for this reason that many commenters recommend that the Commission focus its concerns for diversity on the local markets. Indeed, it would appear eminently reasonable to consider viewpoint diversity to be primarily a matter pertaining to local diversity, in that viewers in San Francisco, St. Louis and Philadelphia each judge viewpoint diversity by the extent of sources of ideas available to them, not by whether those same or other ideas are available in other broadcast markets. Moreover, it is apparent that restrictions on the ownership of radio and TV stations at a nationwide level bear no necessary relationship to the number of independent viewpoints in a particular local market, nor does relaxation or abolition of this rule affect the Commission's local ownership restrictions. Consequently, the lack of relevance of the rule to local viewpoint diversity persuades us that elimination of the national ownership rule is unlikely to have an adverse impact on the number of independent viewpoints available to consumers.

33. Even if the relevant geographic area were the entire nation, the number of independently owned mass media relevant to diversity of viewpoint is enormous. We earlier referred to the literally thousands of radio, TV, magazine, newspaper, cable and periodical outlets available nationwide. Even narrowing the focus of analysis to TV and radio outlets alone, it is readily apparent that each service now provides a wide range of independent voices nationwide.

3. Changes in the Availability of Diverse Viewpoints Nationwide

34. In the thirty years since the Rule was adopted, the growth in radio and TV outlets has been truly extraordinary. Where there were 2,458 AM stations and 686 FM stations in 1953, there are today 4,747 AM stations and 4,717 FM stations on the air; more than 10,000 AM and FM stations on the air or with construction permits.[28] The total number of stations has therefore more than tripled, and 684 recently allocated additional FM stations should be in operation shortly.[29] Furthermore, in today's radio

[28] *Broadcasting,* 9 July 1984, p. 78.

[29] See *Report and Order,* BC Docket No. 80-90, 53 R.R. 2d 1550 (1983).

programming and service markets, there currently exist 118 national and regional radio networks, 23 radio program distributors, and 221 firms in the business of producing and distributing fare for radio stations.[30] This is in sharp contradistinction to the early development of radio, when a few large networks dominated programming nationwide.[31]

35. The primary changes in the television market have been the explosion in the number of stations on the air and the competition that traditional broadcast outlets now face from new broadcast technologies and from non-broadcast services such as cable:

- The number of television broadcast stations on the air has increased from 199 in 1953 to 1,169, in April 1984;[32]
- Cable television has grown from an estimated 150 systems serving 30,000 subscribers in 1953 to approximately 6,400 systems with 32-35 million subscribers in 1984. Cable now passes 64 percent of all television households;[33]
- Other sources of programming, now in their infancy, are expected to offer an increasing number of alternatives to viewers. These, of course, were not available in 1953. There were 99 multipoint distribution service (MDS) systems in place in 1982, serving some 565,000 subscribers, and the Commission expects this service to expand as a result of the reallocation of certain spectrum for multichannel MDS service.[34] The Commission has received over 16,000 applications for multichannel MDS systems, some of which propose systems of eight or more channels. Subscription television stations serve almost a million viewers, satellite master antenna services should pass one million television homes by the end of 1984, direct broadcast satellite service is expected to commence in the near future, and the Commission is currently processing over 12,000 applications for lower power television stations. Additionally, the existence of over 8.3 million home video cassette recorders ("VCR's") in American homes as of December, 1983, with cassettes available for rent as well as for purchase, adds a new dimension to programming diversity.[35] Sales of VCR's are projected at 5 to 6 million annually over the next 5 years; VCR penetration is expected to reach 50

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[30] *Joint Comments of Broad Street Communications Corp., Cox Communications Inc., and Plough Broadcasting Co., Inc.* at 11-12, citing the *1983 Broadcasting/Cablecasting Yearbook.*

[31] "Those early networks owned or controlled most radio stations and provided the bulk of programming . . . [s]tructurally radio was tending toward a concentration of voices. Today's networks primarily provide specialized programming for only a portion of the day. The result has been to increase diversity rather than uniformity." *Notice of Proposed Rulemaking,* B.C. Docket No. 79-219, 44 F.R. 57636, 57648 (October 5, 1979) ["Deregulation Notice"].

[32] See Federal Communication Commission, *48th Annual Report* Fiscal Year 1982 (1983) at 106-07 and *Broadcasting,* 9 July 1984, p. 78.

[33] *Television Factbook,* (Cable and Services volume, 1984 ed.), p. 1,725.

[34] MDS is a microwave service capable of delivering video programming to points within line of sight of the transmitter. Initially this was a one-channel service, but our 1963 reallocation of spectrum for MDS use and concomitant grant of permission to ITFS operators to leave some capacity to commercial users has opened up the possibility of multichannel service. See *Report and Order* in Gen. Docket 80-112, 48 Fed. Reg. 33873.

[35] *Id.* at 18.

percent by 1990.[36]

36. The *Notice* suggested that, in light of these developments:

> the potential for such national ownership concentration as would tend to . . . threaten diversity is far less a matter of concern today than might have been the case in 1953 and earlier years . . .[37]

Examination of the record in this proceeding now convinces us that this growth in the number of programming sources is a significant factor that supports abolition of the rule.

37. Commenters challenged various aspects of this analysis. Some disagreed that there had been a significant growth in viewpoint diversity as a result of the tremendous increase in the number of television stations. In this regard it was suggested that the growth in the number of on-air broadcasting stations was overstated by the *Notice* and that the increases are not as dramatic as they appear because the population grew also.[38]

38. In regard to the growth of on-air stations, these commenters suggest that the Commission's use in the *Notice* of statistics indicating the number of on-air stations in 1953 is misleading because "the Commission's reliance on on-air stations does not recognize the fact that in 1953 the Commission was fully aware of impending growth in the industry."[39]

39. The Commission, however, specifically sought to identify in the *Notice* the number of stations actually broadcasting in 1953, as it similarly did when listing the current availability of the new technologies of STV, MDS, LPTV and SMATV.[40] Even the alternative numbers the commenters propose—273 television stations authorized as of January 1, 1953, or 567 stations licensed as of January 1, 1955—amply demonstrate the dramatic difference between the number of stations broadcasting in the 1950's and the 1,169 television stations on the air or under construction today.

40. Further, some commenters[41] object to the Commission's recognition of the impact of the newly emerging technologies such as STV, MDS, LPTV and SMATV in its evaluation of the existing broadcast market by

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[36] *Television Digest with Consumer Electronics,* 6 February 1984, p. 15; "Ad 'Zapping' Held Threat to TV Market," *Washington Post,* 18 July 1984, Sec. D, p. 1.

[37] *Notice,* 48 Fed.Reg. 49444.

[38] These arguments are contained in the *Joint Comments of Black Citizens for a Fair Media, League of United Latin American Citizens, National Association for the Advancement of Colored People, National Association for Better Broadcasting, National Conference of Black Lawyers Communications Task Force, and Telecommunications Research and Action Center.*

[39] *Id.* at 41-42.

[40] *Notice,* 48 Fed.Reg 49443-44.

[41] *Supra.,* note 38 at 46-52.

declaring that "[a]t best, many of the substitutes enumerated by the Commission are in their infancy and are not available to most people."[42] At the outset we note that this issue is irrelevant to the central fact that the number of broadcast stations has increased dramatically since 1953, and also dramatically above the number of stations authorized in 1955. Moreover, it is entirely appropriate for the Commission to attempt to evaluate the future of the broadcast and cablecast market and of the new technologies and services as part of this rulemaking. Indeed, we would be derelict in our responsibilities to the public interest were we to ignore the developments now occurring, and those evidently on the way.

41. We also reject the argument that "[p]opulation shifts and increases, demographic changes and increases in the number of television homes have neutralized the effect that the growth in broadcast stations has had on diversity of programming and ownership"[43] and that "the Commission must concede the fact while more people are being served by more stations, the ratio of stations to viewers has greatly *declined.*"[44] The Commission does indeed agree that "more people are being served by more stations," which was one of our primary contentions in the *Notice,* but cannot accept the notion that the "ratio of stations to viewers" has any possible relevance to this proceeding.

42. This theory is apparently based on the premise that the proper way to measure diversity is the ratio of viewers to stations, so that a city of 100,000 and one station has the same diversity per viewer as a city of 1,000,000 and ten stations, a notion we cannot accept. The Commission instead believes it to be clear that, particularly in the realm of "free" commercial television, each new station adds a new voice and the potential for greater viewpoint diversity. For no matter how much the viewing population grows, each individual viewer can receive all available stations, a fact not diminished by the existence of any additional number of viewers. And in terms of sheer numbers, the dramatic increase in broadcast outlets, especially when considered relative to the number of print outlets such as daily newspapers, does not support applying special restrictions on ownership of broadcast media that do not apply to those other media forms.

43. In short, elimination of the Seven Station Rule poses no threat to the diversity of independent viewpoints in the information and entertainment markets. The mass media relevant to these markets include a wide range of new technologies as well as print, TV and radio outlets. Media ownership at the national level need not—and given the Commission's local ownership rules cannot—reduce the number of independently owned

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[42] *Id.* at 46.

[43] *Id.* at 36.

[44] *Id.* at 38.

cable, TV and radio outlets available to the individual consumer in his community. Thus, the rule does not affect the number of viewpoints in the relevant information market. Looking at the national level, *arguendo,* the U.S. enjoys an abundance of independently owned mass media outlets. This is true generally and for TV and radio stations when each group is considered alone.

4. The Effect of Group Ownership on Viewpoint Quality

44. Thus far we have examined the effect that elimination of the rule would have on viewpoint diversity in the local information market. Also relevant to our diversity goal is whether its repeal would remove any hindrances to the flow of information, which might be the case if group-owned stations provide a different mix of programming that better matches consumer preferences. We accordingly specifically requested in the *Notice* that commenters address themselves to this issue.[45] At the outset, we note a study by Professor Parkman showing that group-owned stations have significantly higher ratings on their local news programming.[46] This suggests that group-owned stations do a superior job of responding to viewer demand for news.

45. Several commenters discussed the quality and diversity of programming by group and network owners. The National Association of Broadcasters (NAB)[47] states that "[s]tudies of the performance of group-owned stations suggest the fallacy of assuming direct inflexible correlation between diversity of ownership and diversity of programming."[48] NAB cites a study which compared group-owned and individually owned television stations in six markets, based on interviews with media personnel, owners, managers, staff and business and community leaders.[49] The study concluded that:

> Commonly-owned media have larger news staffs, do more news programming, and are less dependent on the wire services and networks for news than singly-owned media;

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[45] *Notice,* 48 Fed. Reg. 49446.

[46] Parkman, Allen M. "The Effects of Television station Ownership on Local News Ratings," 64 *Review of Economics and Statistics* (1982): 289-95. For 1975, the average rating for early evening news programs in the sample was 12.02; for late evening it was 9.97. The ratings for group-owned stations were 2.65 and 1.99 points respectively higher than those for stations that were not group-owned.

[47] *Comments of the National Association of Broadcasters* at 19.

[48] *Id.*

[49] The study was by George H. Litwin and William H. Wroth and is entitled "*The Effects of Common Ownership on Media Content and Influence: A Research Evaluation of Media Ownership and the Public Interest.* For methodology and a further description, *see Comments of the National Association of Broadcasters* at 19.

> Commonly-owned media are perceived by business and community leaders as providing greater validity and depth of news coverage, better quality programs, more public service, . . .
>
> [s]ingle owners are more concerned with short-term profits, while common owners (who are generally stronger financially) are more concerned with establishing a reputation for service which will provide long-term economic stability.[50]

46. NAB also cites a study it conducted which indicates that, on average, group owned stations offer more public service programming than non-group stations. The study found that "group-owned stations devoted 18.4 percent, 10.1 percent and 32.0 percent of an average broadcast day (6 a.m. to midnight) to informational, local, and total nonentertainment programming, respectively. Non-group-owned stations devoted 12.9 percent, 6.9 percent and 24.8 percent of a broadcast day to these same program categories, respectively."[51]

47. NBC compares the programming of its stations with all those stations broadcasting in the top 25 markets, and notes that the comparison, using FCC figures, is quite favorable:[52]

6 AM—Midnight	*Top 25 Market Stations*	*NBC Owned Stations*
Total News and Public Affairs	14.3%	20.7%
Local News and Public Affairs	8.7%	12.0%
6 PM—11 PM		
Total News and Public Affairs	15.1%	22.3%
Local News and Public Affairs	9.3%	13.2%

48. NBC also cites a lengthy list of honors garnered by NBC-owned stations, including "national honors such as the George Foster Peabody Award; Ohio State University awards for meritorious achievement in educational, informational, and public affairs broadcasting; NATPE awards from Action for Children's Television; and awards from American Women in Radio and Television for presenting positive women's images."[53]

49. CBS presents much the same evidence of quality in local programming, noting that each of its television stations "devote[s] a very

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[50] *Id.* at 20.

[51] *Comments of the National Association of Broadcasters* at 20.

[52] *NBC Comments* at 133, citing FCC Television Broadcast Programming Data, 1979. These figures are suggestive but it would have been more useful to have controlled for network affiliation and VHF status as well.

[53] *Id.* at 131.

significant portion—from one and three-quarters to three and a quarter hours—of each weekday's programming to local hard news broadcasts. This local news service is scheduled almost entirely in the high viewership hours of early and late evening."[54] Further, "[i]n a time when television news is often characterized as nothing more than a headline service, the CBS stations have a variety of well versed specialists. For example, each station has a medical/science reporter, including in New York, a physician . . . all of the stations have economics or consumer reporters. . . ."[55] CBS claims that "[t]he excellence of this news service has been recognized in the dozens of awards each station has received from leading professional organizations and community organizations."[56]

50. Similarly, Metromedia cites a large number of programs which it has produced as a group owner, either by itself or in coordination with other owners, including information and public service programming.[57] The information and public service component of this programming included news and shows concerned with legal [58] and health [59] issues. Other group owners such as the Tribune also originate some of their own programming. That group owner has established the Independent News Network.[60]

51. The Commission believes that the differences between independent and group-owned stations' programming are important. First, they demonstrate that the availability of more network and group-owned stations might enhance the information and entertainment markets by increasing the amount of local news and public affairs programming. Such additional programs, plus the growing number created especially for

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[54] *CBS Comments* at 50.

[55] *Id.* at 51.

[56] *Id.* For their local news alone, the CBS owned television stations received a total of at least 65 awards from professional associations in 1983," including "the prestigious Columbia-Dupont and George Foster Peabody awards . . . as well as a combined total of 26 Emmy Awards." CBS notes in addition that regularly-scheduled local issues programming—including interview broadcasts such as WCBS-TV's PUBLIC HEARING, a broadcast designed primarily to provide New York-area viewers with an opportunity to learn the views of area Congressmen and other political leaders; documentary broadcasts such as KMOX-TV's EYE ON ST. LOUIS; youth-oriented religious broadcasts such as WBBM-TV's DIFFERENT DRUMMER; and discussion broadcasts such as WCAU-TV's UPDATE and KNXT's INTERFACE—generally constitutes from 7 1/2 to 17 hours of each station's weekly program schedule. In addition to these regularly-scheduled broadcasts, each station presents numerous locally produced "special" broadcasts, very often of a documentary or hard news nature—broadcasts such as WCAU-TV'S prime-time political documentary, "Last Campaign of Lady Jane," and KNXT's special prime time news report, "Mexico in Crisis." *Id.* at 52.

[57] *Comments of Metromedia, Inc.* at 22-23.

[58] "Millers Court", *Id.* at 24.

[59] "Healthbeat", *Id.* at 24.

[60] *Id.* at 33.

cable systems, [61] will better meet the programming demands of the public.

52. In a related area, we asked in the *Notice* that commenters discuss "any evidence that either local or national news which is locally originated by group-owned stations represents the group's "monolithic viewpoint."[62] This issue is relevant because any concern with broadcast concentration at the national level will be attenuated to the extent that stations owned by groups provide independent viewpoints. The evidence presented by the networks, which was not controverted, shows that their group-owned stations take editorial positions and make basic reporting and coverage decisions on an autonomous basis, frequently through the mechanism of a station's editorial board.[63] The essence of the comments addressed to this question is contained in the citation by the National Association of Broadcasters to a study which showed that decision-making appeared to be most solidly under the local control of group-owned stations in the news, public affairs, and editorial areas.[64] The fact that such diversity of viewpoint in local news reporting and in editorializing on local issues exists alongside a group or network ownership structure means that it is indeed possible to have greater viewpoint diversity than there is ownership diversity. This, combined with the fact that commenters presented evidence indicating that network and group-owned stations are *more* likely than independents to editorialize, is important evidence that allowing increased group ownership will aid in providing consumers with the variety of information they want.[65]

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[61] *See Comments of National Broadcasting Company, Inc.* at 25-42. The *Comments* detail the dramatic growth of cable and the enormous quantity and variety of cable programming.

[62] *Notice,* 48 Fed. Reg. 49449.

[63] *See Comments of CBS, Inc.* at 55, *National Broadcasting Company* at 132.

[64] Patrick, Lawrence W. and Howard, Herbert H., "Decision Making by Group Broadcasters," *Journal of Broadcasting,* 18:4 (Fall, 1974), pp. 465-71, cited in *Comments of National Association of Broadcasters at 21.*

[65] The following evidence is presented in the *Comments of CBS, Inc.* at 55-57:

> [E]ach of the CBS Owned television stations regularly presents station editorials and editorial replies on issues of vital concern to its service area. While each of the stations has its own particular pattern, for the most part they present five, and sometimes as many as seven, separate editorial opinions or replies in a week. . . . A full-time editorial staff is maintained by each of the five stations.
>
> The editorial positions of each station are established on an *entirely* autonomous basis by the individual station's editorial department (the operations of which are completely divorced from the operations of the station's news department). The fact that each station reaches its editorial positions completely independently (and that the monolithic "CBS Inc. position" assumed by much diversity analysis simply does not exist) is demonstrated by the considerable frequency with which a CBS Owned radio station in a particular market takes an editorial position directly opposed to one taken by the CBS Owned television station in the same market. For example, in 45 percent of the instances during the last four years in which a CBS

53. We also note that no evidence has been presented to the Commission by any commenter of examples of group owners suppressing independent viewpoints despite a specific request in the *Notice* for examples of such conduct. Equally, the Commission has been given no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming, or editorialize more frequently on subjects of local interest, or produce more news, investigative journalism, or issue-oriented programming.

54. The Supreme Court has instructed that the public interest standard that governs the Commission's policies invites reference to First Amendment principles. *CBS, Inc.* v. *DNC,* 412 U.S. 94, 122 (1973). A cherished First Amendment principle crowns speech that addresses political or public affairs with maximum constitutional protection because of its centrality to efficacious democratic government. *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). The record in this proceeding demonstrates that network and group owners offer the electorate more.

55. Accordingly, fidelity to First Amendment values and the public interest counsels the Commission against rules or policies that could artificially restrict group ownership of broadcast stations, thereby reducing the amount of the news or public affairs programming that fosters an informed electorate. The record assembled by the Commission supports the conclusion that our fundamental concern for a well-informed citizenry is better served by removing rather than retaining government barriers to group ownership of broadcast stations.

56. This recognition by the Court of the central role played by broadcasters in furthering First Amendment concerns, and of the importance of programming initiatives and judgements by those broadcasters, places a special burden upon the Commission as it seeks to

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Owned television station and a CBS Owned radio Station serving the same market have both made endorsements in a particular electoral race, they have endorsed opposing candidates. . . . It is notable that a distinct minority—and likely a very small minority—of television stations regularly editorialize. A 1982 survey on editorializing by the National Broadcast Editorialists Association and the National Association of Broadcasters drew responses from only 420 of America's roughly 900 commercial television stations, of which only 294 stated that they editorialize at all and only 103 stated that they editorialize more than once a week. Fifteen of those 103 stations are owned by network companies. Thus, while all stations owned by network companies editorialize at least twice a week, it would appear that a very modest fraction of the country's other commercial television stations editorialize with significant frequency—or at all. Newsletter of the National Broadcast Editorialists Association, March-April, 1983, p. 2.

See also the *Comments of the National Broadcasting Company* at 131-132.

NOTE: Footnote 66 was inadvertently omitted and will not appear in the text.

regulate in the public interest in a manner consistent with these First Amendment principles. As it applies to this proceding, we are compelled to give special weight to evidence showing a greater quantity of public affairs and news programming, as it is this programming which best advances First Amendment interests.

57. In this connection, some commenters also claim that the Rule of Sevens hinders the development of independent programming, and that raising the number of stations which a group may own could have a significant positive effect on the development of new programming. This claim is detailed in the Metromedia comments.[67] Metromedia asserts that it has invested significant resources in an attempt to "create new non-network programs to provide product for independent stations and to provide viewing alternatives for the American consumers" but the commenter claims that "the Commission's ownership rules have seriously impedeD Metromedia's efforts."[68]

58. The argument made is that the

> Commission's dogged pursuit of the widest possible dispersion of station owners has had a perverse effect of assuring that no group owner can become strong enough to establish an independent voice separate and distinct from the networks.[69]

This is so because "[t]he creation of original television programming is an enormously expensive process. The existing affiliate structure provides each of the networks with more than 200 outlets against which it can amortize program costs. Under the numerical proscription rules, the group owner can be assured of only *seven* outlets for its product."[70] The result of this disadvantage is that the national advertising market takes on a high degree of importance for group owners: by obtaining national advertiser support for their independent programming, they can afford the production costs and compete with the networks. However, "[n]ational advertisers require clearance in at least 75 percent of the nations' television homes before they will commit to a program."[71] Metromedia states that it is unable itself to own enough stations to reach 75 percent of the market, and frequently is unable to obtain clearance for its programs from enough small owners to guarantee a 75 percent market reach. Metromedia further argues that the existence of several group owners with substantial market shares would enable them, singularly or in combination, to produce independent programming and challenge the networks in the national advertising market:

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[67] *Comments of Metromedia, Inc.* at 25-27.
[68] *Id.* at 24-25.
[69] *Id.* at 21.
[70] *Id.*
[71] *Id.* at 25.

> Repeal or relaxation of the seven station ownership limitation would enable Metromedia, and other licensees, to build a base of stations in key markets sufficient to support the development of innovative new programs. Stronger station groups could then mount more effective competition to the dominant national networks and provide the American public with greater television program diversity.[72]

59. It is appropriate to note here that the Commission has reviewed with a critical eye the comments of the network and group owners on the subject of diversity of programming. However, the Commission may properly rely on the information contained in these Comments in reaching a determination in this rulemaking, as the Court of Appeals for the District of Columbia Circuit recently held in *National Association of Regulatory Utility Commissioners v. F.C.C.*.[73] Thus, while the network and group owners' information concerning diversity of programming is not the only factor which has influenced our determination herein, we believe it places before the Commission important facts unavailable when the rule was adopted in 1953.

5. Conclusion

60. Within the United States, the most important idea markets are local. For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market. For that individual, whether or not some of those views are also disseminated in other local broadcast markets does not affect the diversity to which he is exposed. Accordingly, national broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.

61. It is true, however, that ideas can migrate from one local market to another. Thus it might be argued that there is First Amendment utility in preventing duplication of viewpoints amongst local markets to increase the likelihood that edifying ideas will blossom and spread nationwide. It could be argued that national ownership rules might address this concern for the emergence of good ideas by preventing a single owner from echoing an identical voice in a large number of local markets. However, our concern for this theoretical benefit of the multiple ownership rules is answered by at least three factors. First, the record demonstrates that group owners do not impose monolithic viewpoints on local media outlets; indeed, the record demonstrates the opposite. Therefore, ownership by an entity of a number of broadcast stations located in different markets does not result in fewer viewpoints nationwide. Second, there is such an

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[72] *Id.* at 26. Also, see para. 98-99, 105-107 *infra*, for an explanation of why this mechanism will not be thwarted by network acquisition of stations.

[73] *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, No. 83-1225, slip. op. at 51-63 (D.C. Cir., June 12, 1984).

abundance of idea sources in the aggregate nationwide—more than 10,000 broadcast stations and more than 12,000 newspapers and periodicals—that eliminating the Rule of Sevens would at worst occasion an inconsequential decrease in idea sources nationwide. And even this decrease assumes that group owners will express identical viewpoints in the local markets where they own stations, an assumption contrary to the record.

62. Third, group ownership likely has offsetting advantages in enriching the variety of information available in the local community. Group owners may be able to devote more resources to newsgathering and other activities which improve the quality of programming presented. There is no evidence in this record suggesting that the hypothetical benefits from promoting many sources of ideas outweigh the benefits from new and more expensive programming made possible by allowing broadcasters and other mass media to choose the organizational structures they believe make them most efficient.

63. In light of the evidence presented by commenters on the irrelevance of national broadcast ownership levels to viewpoint diversity, the discussion above of such factors as the dramatic increase in the number of radio (especially FM) and TV stations since the Rule of Sevens was adopted, the inhibiting effects of the rule in the development of new programming, and the efforts of network and group owners in public affairs programming, the Commission concludes that the public interest, insofar as it relates to encouraging a diversity of viewpoints, would be well served by eliminating the restriction on the number of stations that a single entity may own nationwide.

B. Economic Competition

64. The other primary concern of the Commission when it adopted the Rule of Sevens was the prevention of anti-competitive activities. The Commission believed there was a danger that several owners would come to dominate the television and radio markets and wield power to the detriment of small owners, advertisers, and the public interest. Therefore, any review of the efficacy of retaining the Rule of Sevens must carefully examine, first, the advertising marketplace in which television and radio stations compete to determine whether altering the Seven Station Rules would present any danger of competitive harm, and, second, whether repeal of the rules might promote the more efficient operation of broadcast stations.

65. Regarding the possibility of competitive harm, the Commission notes the conclusion of the Department of Justice that "elimination of the Seven Station Rules will raise little risk of adverse competitive effects in any market," and that "license transfers involve no significant competitive risk merely because they result in common ownership of more than

seven stations in a broadcast service."[74] The Department of Justice, which is the executive agency responsible for enforcing the antitrust laws and promoting competition,[75] reached this conclusion by defining and analyzing the relevant product and geographic markets.

1. The Relevant Product and Geographic Markets

66. Since the Department of Justice saw almost no chance of a lessening of competition by increased national ownership of radio stations, it focused its market analysis on television.[76] In defining that relevant product market, the Department noted that

> [t]he product supplied by conventional over-the-air and advertiser supported cable television presents unusual problems in market definition because viewers, the apparent consumers of television, are actually the "product" sold to advertisers, the real purchasers in the television marketplace. Programming, the apparent product of television, is merely an input into generating audiences. Broadcasters compete to obtain programming that will produce the largest audiences with the demographic characteristics most highly valued by advertisers.[77]

67. The Department's comments examine the possibility that the relevant economic product market should also include advertising available through newspapers, magazines and radio as well as television. The Department states that "[t]he threshold issue is the degree of substitutability between television advertising and advertising through other media. . . . [If] advertisers would readily respond to a price increase in television advertising rates by shifting to advertising on other media, then these other media are in the same market."[78] The Department found, though, that this substitutability does not exist to any great degree, largely because of "the greater impact on audiences of visual commercial messages than print or aural messages," and the fact that television "reaches a higher percentage of the population than any other media form."[79] However, the Department did note that "[t]his is a worst-case analysis. To the degree that advertising on other media is in the same market as television advertising, possible competitive effects of elimination of the rule would diminish."[80] Other commenters disagree with the exclusion of newspaper and radio advertising from the calculus.[81] While we question whether the product market should exclude all other advertising media as the Department proposes, for purposes of analyzing the effects of eliminating the Seven Station Rule we will use this worst

[74] *Comments of the United States Department of Justice* (DOJ) at 2-3.
[75] *Id.* at 2.
[76] *Id.* at 8, 26.
[77] *Id.* at 10.
[78] *Id.* at 11.
[79] *Id.* at 12.
[80] *Id.* at 13.
[81] *Comments of CBS, Inc.* at 22-25.

case analysis and treat the TV and radio advertising markets as separate product markets.

68. We note that this discussion of advertising markets, however, is fundamentally different from our earlier discussion of the appropriate markets for judging viewpoint diversity.[82] Advertisers are concerned with numbers of viewers and readers, as well as the relative characteristics of print, audio and visual mediums to convey a commercial image, and these factors are properly considered under the rubric of "substitutability" in economic and antitrust analysis. Different considerations are involved, however, in determining the local availability of a variety of ideas, the question with which we concern ourselves when judging the viewpoint diversity necessary for rich public or political discussion.

69. Within the television advertising product market the Department of Justice concluded that there are two separate product markets: that for network advertising, and that for spot advertising. It defines the former as "advertising that is displayed over nationally distributed television programs" and the latter as "advertising that is broadcast by local stations and sold by the stations or their representatives."[83] The Department explains that "[f]irms that market nationally are not likely to find spot to be an effective substitute for network advertising in achieving nationwide coverage. Networks give advertisers access to a substantial portion of all television households at a specific time and day. Acquiring such advertising coverage through spot contracts would involve substantially higher . . . costs. Firms that sell in limited geographic areas, on the other hand, would not substitute network advertising for spot advertising. It would not be cost effective for such firms to pay to reach large numbers of viewers outside of the area in which they operate."[84]

70. The Department of Justice defines the relevant geographic markets as being nationwide for the network advertising market and local for the spot advertising market. It explains that "[a]lthough the major networks sell some regional advertising, the overwhelming amount of their advertising has national coverage. Thus, network advertising is, by its very nature, national."[85] For spot advertising, however, the advertiser seeks to reach specific local markets. If the price is too high, the amount of advertising may be lowered, but it will not be switched to another market.

71. Having defined the relevant product and geographic markets for television, the Department of Justice assesses the likelihood of competitive harm. It notes that the national advertising market is "dominated by

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[82] *See* paras. 24 to 63, *infra.*

[83] *DOJ Comments* at 13.

[84] *Id.* at 14.

[85] *Id.* at 17.

the three national networks," as they are virtually the only nationwide television distribution services. Nonetheless, the Department concludes that elimination of the Rule of Sevens will not increase concentration in the national network market, because each network has already achieved access to almost every local market through its affiliation agreements.[86] In the local spot market, the Department concludes that "[s]ince spot advertising is sold in local geographic markets, and the rule does not address concentration in those markets, a rule change should not affect competition in spot advertising."[87]

72. The competitive analysis for radio is similar. Using the worst case approach, radio advertising is a separate product market. The geographic market for determining whether a radio station operates in a competitive market is the local market in which its signal can be received.[88] A report to the NAB by Professor Michael Wirth concluded, "The primary issues regarding concentration are not with respect to national concentration."[89] Support for defining the radio market as a local one can be drawn from the nature of the market itself. To argue that two radio stations are in competition if their transmitters are in different areas of the country and they cannot therefore be heard by the same audience is inherently illogical. "Radio is a quintessentially local medium. Most radio programming, for example, is developed locally for local broadcast. Radio stations rely to a large degree on music, news and talk formats, all of which are oriented to local production and distribution."[90] Further indications of the importance of the local market may be drawn from the fact that 74.5 percent of advertising on radio comes from local sales, a figure which has risen steadily over the last twenty-five years.[91] As commenters note, it is the characteristics of the broadcast market—station ratings, degree of competition in the listening area, demographics—that determine the advertising market, and these characteristics are all local.

73. Under these circumstances, the fact that local competitors may share common ownership with stations in other markets is unimportant in

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[86] *See Id.* at 20-23. We note that the Department is not sanguine that eliminating the rules will stimulate rivals to the network dominance of the national advertising market. *Id.* Some commenters believe, however, that relaxing the rule will promote the production of attractive new programming. *Comments of Metromedia, Inc.* at 20-26. If this happened, then national advertising prices might be affected.

[87] *DOJ Comments* at 22. But see the discussion at para. 102 *infra.*

[88] *Measurement of Concentration in Home Video Markets, supra* note 23, at 53-54.

[89] M.O. Wirth, "The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry," (NAB 1981) (hereinafter *Wirth Report*) at note 153.

[90] *Joint Comments of Broad Street Communications Corp., Cox Communications Inc., and Plough Broadcasting Co., Inc.* at 20.

[91] Bureau of the Census, 1982-1983 *Statistical Abstract of the United States* at 558. In 1960, local sales constituted 61.3 percent of radio station revenues; in 1970 they were 67.9 percent and in 1980 they were 74.5 percent.

terms of competitive harm. The important consideration is instead the Commission's local rules, which restrict common ownership in local markets. These rules, as we have stated elsewhere in this *Report and Order*, are not changed by this proceeding. In sum, we believe that the prohibition against common ownership of two competing stations in the same market and service makes the Rule of Sevens unnecessary as a guarantee against competitive harm.

2. Measuring Concentration in a Hypothetical National Market

a. Current Concentration Levels

74. The preceding analysis, which relies on a worst case scenario, provides ample reason for concluding that elimination of the rule could result in no competitive harm. The rules simply do not affect competitive performance in the relevant local markets. Moreover, even considering a hypothetical national market and even putting to one side the alternative video and other mass media, it is clear that there is no undue economic concentration for TV alone. The revenue concentration ratios for the top three, six, and twelve group owners of television stations, that is, the percentage they earn of total industry revenues, are 14.2 percent, 23.0 percent and 34.9 percent, respectively.[92] Our staff's calculation, using the Department of Justice's preferred concentration index[93], yielded a value of 229 for the hypothetical national television market. The Department generally considers an index of 1,000 to be the minimum level at which antitrust concerns are raised.[94] One commenter has calculated these measures based upon audience rather than revenue shares, and states that no single owner's share of the potential audience exceeds 3.8 percent, and that the top three, six, and twelve groups have combined shares of only 11.2, 19.7, and 30.1 percent, respectively. This calculation also shows a concentration index for all continental U.S. television stations, based on audience-share figures, of only 115.[95] These relatively low levels of concentration are explained by the fact that "those group owners with the

[92] *Notice*, 48 Fed. Reg. 49447.

[93] The Herfindahl-Hirschman Index (HHI) is used as a measure of relative market concentration. This is an index designed to quantify the threat of anticompetitive practices and undue economic power based upon the structure of an industry.

[94] See *U.S. Department of Justice Merger Guidelines*, issued June 14, 1982. The HHI calculation by our staff is actually an upper bound. When the market shares of all the smaller forms are not known, an upper bound value for the index may be calculated based on "worst-case" assumptions about the size distribution of these shares. See *Notice* at 36-37. One commenter states that comparable HHI figures for other industries are 755 for steel, 925 for semiconductors, 2308 for cigarettes, 2325 for aluminum and 3504 for domestic automobiles. *Comments of CBS, Inc.* at 20, citing unpublished study of John Kwoka, Associate Professor of Economics, George Washington University.

[95] *Comments of CBS, Inc.* at 21.

largest potential audiences generally operate in the markets with the largest number of competing television stations."[96]

75. The radio market has now developed to the point where it is considered to be extraordinarily unconcentrated. Our staff's calculation of the Herfindahl-Hirschman Index (HHI) for the radio industry is 77 on a scale on which 1000 is considered the minimum level for generating antitrust concerns.[97] The Wirth Report states that ". . . the radio industry is essentially unconcentrated at the national level. Since nearly 74 percent of this country's radio stations are non group-owned, competition at the national level would appear to be more than adequate."[98] We find it hard to imagine that this conclusion will change. The Wirth Report notes that group ownership has increased, but at such a slow pace that "if the number of radio stations on the air stayed fixed at its 1980 level, and group ownership continued to increase at this pace, it would take 149 years for all of the commercial radio stations in the United States to come under some form of group ownership."[99]

b. A Media Concentration Index

76. Consideration of a national TV and radio market raises the issue of the desirability of developing a mass media concentration index. Initially the Commission seriously considered the concept of an index. Having considered the comments filed in this and the cable network proceeding, including a study of the issue by the Commission's Office of Plans and Policy, we now believe an index of the appropriate media is neither feasible nor necessary. Although some commenters suggested that it is appropriate for the Commission to establish criteria by which media concentration can be judged, no commenter in this proceeding or in the related cable-network crossownership docket proposed a mechanism for creating a media concentration index. Moreover, several convincing arguments against such an index were advanced.

77. First, some commenters asserted that the relevant market is a local one, so that national concentration indices are irrelevant. NTIA, for example, urges the Commission to develop guidelines for a more sophisticated application of our local market rules, while eliminating the national Seven Station Rule.

78. Second, some commenters suggest that the Commission can safely defer to the Department of Justice or the Federal Trade Commission to guard against anticompetitive behavior. They note that there exists an elaborate structure of antitrust law, and an effective system of enforce-

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[96] *Id.*

[97] *Notice,* 48 Fed. Reg. 49447.

[98] *Wirth Report* at 11.

[99] *Id.* at 73.

ment.[100]

79. The third point, one on which there is wide agreement, is that developing an index would be enormously complicated. Commenters cite differing standards for economic competition and diversity, problems of product market definition (how to aggregate single channel and multichannel video media and how to aggregate print, audio, and video media), the necessity to revise the index as technology changes, problems of aggregating subscriber and advertiser supported media, and problems of measuring market share (revenues versus availability versus viewership or subscribership) systems and many of these problems can be illustrated by trying to fit cable systems and broadcast outlets into one index. The Commission would have to decide whether a cable system represented one independent viewpoint or whether each channel not affected by the Commission's must carry rules or by local access channel requirements constitutes an additional viewpoint. Likewise, there is no clear basis for measuring market share between the two media. If revenues are used, it would likely overstate the significance of the pay services. If availability to viewers were used, cable passby rates would have to be lumped together with estimates of the population residing within various broadcast contours. Lastly, if a subscribership approach were used, paid subscriptions would have to be compared with net weekly circulation figures.[101]

80. Fourth, many commenters argued that the market, however defined, is so unconcentrated now that it is unlikely to become concentrated quickly in the absence of the rule. These parties differed on the question of whether the Commission should develop "merger guidelines" of its own, but even those who advocate such a course suggest that there is plenty of time to develop guidelines if necessary after the rule has been repealed.

81. The fifth proposition is that combinations should be handled on a case by case basis. This was supported by a wide range of commenters, those advocating guidelines and those opposing them. Because we are persuaded by the above arguments, we believe that it is unnecessary to develop and employ a media concentration index at this point.

3. The Potential Efficiency Gains from Repeal

82. Elimination of the rule may allow group owned television and radio stations to exploit important efficiencies. First, in Section III.A.3 above, we described the record evidence that supports the proposition that group ownership can foster news gathering, editorializing and public

[100] *Comments of the National Association of Broadcasters* at 15-16.

[101] For a more detailed discussion see *Measurement of Concentration in Home Video Markets, supra* note 23, at 67-99.

affairs programming, and the development of independent programming by regional or national *ad hoc* networks. Besides advancing the Commission's diversity goal by providing alternatives to the three television networks, such improvements would generate both programming preferred by consumers and more efficient use of the broadcast spectrum. Second, some buyers of stations may have superior skills. Those with superior managerial abilities may be able to do a better job of matching programming to local tastes and thus garner larger audiences. In these cases, the owners who do a better job of satisfying consumer demands earn more from the station and hence value it more highly. Society is well-served by such acquistions. Third, some group owners may have cost advantages derived from economies of scale. These economies may mean that the cost of operating an additional station is less for a group owner than would be the cost of running a single station for a new owner. These economies of scale may stem from the ability to spread the services of management, bookkeeping, secretarial, sales, and programming personnel over a number of stations, and the potential for group advertising sales and program purchases.

83. While these and other kinds of efficiencies are plausible, indeed probable, the current seven station limit makes it difficult to assess how significant they might be. The probable effect on station trading prices may give some indication of their existence and size. Owners and prospective owners of broadcast stations are business people who are interested in obtaining maximum profits from their holdings. As such, all of them—networks, group owners, and individual owners—use the same general procedure to calculate how much they are willing to pay for a broadcast station. Each estimates the stream of net revenues the station would yield over the time it will be owned, and then determines how much it is willing to pay to purchase that yield, plus the potential for an increase in market value.[102] When there are several bidders for a station, the winner will normally be the one to whom the station is worth the most. As noted, the station to be purchased might be worth different amounts to different buyers, depending on the stream of net revenues the station would provide to each.

84. There are two alternative reasons why a station might be more valuable to group buyers no longer constrained by the Seven Station Rule. The first possibility is that the acquisition would permit the group owner to act in an anticompetitive manner. That possibility was analyzed and found to be highly unlikely by the Department of Justice and by this

[102] The economic value of a station can be determined by estimating the net revenue stream over the period of ownership and the expected resale price at the end of that period, and discounting them to current dollars.

Commission.[103]

85. The second possibility is that there are untapped efficiencies of group ownership, which would make additional stations more valuable to group owners. If that were the case, station prices would rise because the efficiencies will increase their value to group buyers. After their review of several studies concerned with the correlation between group ownership and trading price, Besen and Johnson[104], two Rand corporation economists, conclude that these efficiencies are limited and that station prices are accordingly unlikely to rise signficantly. The fact that few groups are at the current ceilings in a very competitive station acquisition market is consistent with this conclusion. However, it is possible that greater efficiencies of size may exist at some level above seven stations, which would explain why an owner unwilling to purchase a total of seven stations might still find it advantageous to own ten or fourteen. This theory would be consistent with the argument commenters made that larger group owners could more easily form ad hoc networks.

86. In sum, given that we see little possibility that repeal of the rule could cause competitive or diversity harm, we believe licensees should be afforded the opportunity to exploit any possible efficiency from group ownership. While the empirical record on their magnitude is weak, the efficiencies posited by the commenters are plausible. Furthermore, given that efficiencies could really only be proven if the rule were eliminated, ironclad proof of their existence should not be a requirement to justify repeal.

C. Additional Issues

1. The Impact On Minorities

87. Several commenters have suggested that relaxation of the Rule of Sevens may have a deleterious effect on minorities. In the course of many years of study, hearings, and Commission actions, however, it has not before been suggested that the Rule of Sevens does, or was intended to, play a vital role in the development of minority ownership or of minority-oriented programming. Before examining this issue in detail, it is important to note that the Commission has long been dedicated to expanding minority participation in broadcasting.

88. The Commission has taken many actions to stimulate minority ownership. In 1978, the Commission instituted its tax certificate and

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[103] See para. 66-75 above.

[104] S. M. Besen and L. L. Johnson, "An Analysis of the Federal Communications Commission's Group Ownership Rules." Rand Corporation, January 1984, at 24-32. Submitted in Gen. Docket 83-1009. For a discussion of the "present value" technique of valuing investments, see E.M. Mansfield, *Microeconomic Theory and Applications.* 3rd ed. (New York, W.W. Norton, 1975), pp. 505-11.

distress sale policies for broadcast properties.[105] These policies have facilitated the acquisition of at least 71 broadcast stations.[106] In 1982, in response to recommendations by the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, the Commission extended the tax certificate policy to cable television, more liberally defined minority owned limited partnerships, and extended tax certificates to individuals selling their limited partnership interest to a minority general partner.[107]

89. The Advisory Committee also made recommendations for legislative changes. The Commission sent two of them on to Congress. These recommended amendment of the Internal Revenue Code to 1) allow the grant of tax certificates on sales of nonbroadcast properties and 2) increase from $125,000 to $5 million the maximum value of used equipment that can be used for calculating the investment tax credit.[108] Both recommendations target the financial constraint facing would-be minority broadcasters.

90. Our recent relaxation of the ownership attribution rules[109] (which had also been urged by the Advisory Committee) will also act directly to relieve the financial constraints facing minorities. By raising significantly the level at which ownership is attributed, the Commission has made it possible for entities such as venture capital firms and institutional investors to provide financing to a wider range of stations. This will facilitate, for example, arrangements in which a minority general partner raises money from a series of limited partners to finance a station. Indeed, relaxation of the Seven Station Rule will enhance this effect. Finally, in response to a Congressional mandate, we have instituted significant minority preferences in lotteries used to select licensees in mass media where the licensee controls the content.[110]

91. Some commenters suggest that any changes the Commission makes in the Rule of Sevens will likely damage the interests of minorities. Their concern appears to center on the possibility that altering the rule will lead to higher station prices, thereby raising the cost of entering the broadcast market, and that this will particularly disadvantage minority entrants.

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[105] *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979 (1978).

[106] *See* Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications "Strategies for Advancing Minority Ownership Opportunities in Telecommunications (May 1982) at 4, 7.

[107] *See* "FCC Acts to Increase Minority Participation in Telecommunications Field," FCC News Release, Report No. 5112, December 3, 1982.

[108] *Id.*

[109] *See Report and Order* in MM Docket 83-46, 49 Fed. Reg. 19482 (May 8, 1984).

[110] *Second Report and Order* in Gen. Docket 81-768, 48 Fed. Reg. 27182 (June 13, 1983).

a. The Significance of Station Prices

92. A number of commenters have suggested that any increase in the number of stations that may be owned by a single entity will lead ineluctably to a general increase in station prices.[111] Indeed, some commenters' primary objection to changes in the rule is bottomed on this perception and on the concomitant suggestion that such a general price rise would make it more difficult for minorities to purchase stations.[112] While we have no hard evidence that station prices will rise as a result of repeal of the Rule, we nonetheless consider the effect on minorities if they were to rise. We must note that the Seven Station Rule was not intended as a mechanism for artificially deflating the prices of stations. Indeed, as explained in para. 82-86 above, the record persuades us that if station trading prices increase it will be because the new group-owned stations can operate more efficiently. And such increases in station prices would be commensurate with the benefit to the general public. These findings place a heavy burden on those commenters seeking to use the rule as a mechanism for deflating station prices by impeding the achievement of business efficiencies and thereby promote minority ownership. We do not believe they have met that burden.

93. Furthermore, the Commission has determined, primarily through the Advisory Committee, that the major barrier to increased minority ownership is the unavailability of adequate financing. This being the case, the possibility that a relaxation in the Rule of Sevens may lead to higher station prices does not, in itself, disadvantage minorities. The argument is made by several commenters that minorities will be injured by higher station prices because they will be less able to pay them.[113] In this regard we note the following three points. First, the Seven Station Rule was not designed to foster minority ownership in the broadcasting industry and has not yielded such an effect. Second, the current limit of seven has not ensured that stations are priced today within economic reach of minori-

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[111] *See,* for instance, *Comments of Black Citizens for a Fair Media; League of United Latin American Citizens; National Association for the Advancement of Colored People; National Association for Better Broadcasting, and National Conference of Black Lawyers Communications Task Force* at 56; *Comments of National Association of Black-Owned Broadcasters* at 2; *Comments of Monetta K. Anderson* at 10; *Comments of the National Black Media Coalition* at 9; and *Comments of Karen R. Osborne* at 10.

[112] *See, Id.*

[113] *See,* for instance, *Comments of Black Citizens for a Fair Media; League of United Latin American Citizens; National Association for the Advancement of Colored People; National Association for Better Broadcasting and National Conference of Black Lawyers Communications Task Force,* at 56; *Comments of National Association of Black-Owned Broadcasters* at 2; and *Comments of the National Black Media Coalition* at 9.

ties, especially in major markets. In such markets, broadcast station prices are already extremely high. While large cities are not the only markets of interest to minority owners, the concentration of minority group members (in particular, Blacks, Hispanics, and Asian-Americans) in the urban markets suggest that these are markets of particular interest. Those with limited financing are already precluded from these markets. It is precisely this situation which has led to Commission concerns about minority ownership. Third, should station prices indeed rise, this event would only indicate that additional stations are of economic value to group owners, a fact which would be of equal significance to minority and non-minority owners in making station ownership decisions, and in justifying financing for those decisions.

94. In conclusion, we believe it is the availability of adequate financing for station acquisition that is of crucial importance to prospective minority owners. Therefore, the appropriate focus of our efforts is to promote the availability of financing to minorities on equal terms with all other owners. If it is, then minorities will be on an even footing with others in bidding for stations at market prices. If such financing is not made available to minorities, then they will remain largely unable to purchase stations, either at yesterday's prices, today's high prices, or the hypothetically even higher prices following relaxation of the Rule of Sevens. Minorities *per se* are no more disadvantaged by marketplace prices than any other small would-be owners; if financing can be made available through Commission actions, then marketplace prices can be paid. If financing is unavailable, then it makes little difference how high marketplace prices go. It would be inappropriate for the Commission to retain or adopt rules in order to deflate market prices artificially so as to assist any particular group.

b. The Effect on Minority Programming

95. Finally, some commenters suggest that altering the Rule of Sevens may threaten programming diversity because existing minority owners may sell their stations to other, non-minority, owners should the value of those stations rise as a result of greater demand for stations.

96. There is no evidence in the comments presented to the Commission that minority owners would sell their stations in disproportionate numbers or not acquire new ones, or that among wholly new entrants there would not be some minority owned entities. It is, moreover, wholly inappropriate for the Commission to "protect" minority owners from the opportunity to sell their stations at a profit if they so choose. Such action would constitute a form of paternalism that is neither necessary nor appropriate.

2. The Special Case of the Three TV Networks

97. We do not believe that the three broadcast networks when they function as group owners should be treated differently from other groups. While a few commenters[114] have raised the possibility of anticompetitive effects from network ownership of additional stations, we find the arguments unpersuasive. The Department of Justice has characterized network operation of broadcast stations as a form of vertical integration, and we concur. Networks produce programming, sell advertising, and own broadcast outlets. The question is whether the market would be harmed by allowing networks to extend their activities at one level of this vertically integrated structure by purchasing more outlets. The major potential harm from vertical integration is foreclosure of access of independent producers to audiences. Should it occur, foreclosure would have adverse consequences for both competition and diversity. We discuss the issue of foreclosure below, then consider diversity concerns, and examine allegations concerning advertising markets. Finally, we review the networks' arguments for nondiscriminatory treatment.

a. Foreclosure

98. The acquisition of a local station by a broadcast network is essentially a vertical combination. Vertical integration may improve the efficiency of broadcast operations. It has the potential for anticompetitive consequences only when most or all outlets in a significant area are commonly controlled. In that situation, rival networks or other sources of programming may be foreclosed from access to the public.[115] The Commission's various local ownership rules would generally prevent a network from controlling more than one broadcast outlet, radio or TV, in a local market.[116]

99. Given that safeguard, we do not believe that network acquisition of affiliates[117] would have a significant effect on rival programming

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[114] *See, e.g., Comments of Turner Broadcasting System, Inc.*

[115] For a discussion of the potential efficiencies of vertical integration and the low likelihood of foreclosure see K. Gordon, J.D. Levy and R.S. Preece *FCC Policy on Cable Ownership*, Office of Plans and Policy, Federal Communications Commission 1981, at 108-15, 183-93. See also Network Inquiry Special Staff, Federal Communications Commission. *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October 1980). Vol I at 394-400 for similar conclusions based on a specific analysis of the broadcast networks.

[116] *See* Note 6, *supra.*

[117] It is possible, but in our view unlikely, that networks would seek to acquire independent stations and maintain affiliation with other stations in those markets. We, like the Department of Justice, would scrutinize such potential acquisitions carefully. In particular, we would need to determine if they constitute a violation of § 73.658(f) of our rules. Absent compelling circumstances, it is doubtful that we would approve such an acquisition.

networks. The Network Inquiry Special Staff, in recommending reconsideration of the multiple ownership rules concludes that

> a ban or limitation on the networks' ability to own broadcast stations cannot be justified on the grounds that such vertical integration will injure potential competition in the networking market. Rather it is the horizontal concentration of station ownership at the national and local level to which attention should be turned.[118]

The Department of Justice points out that affiliates have not played a major role in the formation of prime time *ad hoc* networks.[119] Network affiliates already clear 97 percent of the networks' prime time schedules and 87 percent of the daytime feed.[120] Even if those percentages rose to 100, the marginal effect on time available to non-network programmers would be small. In other time periods, including non-network feed time periods, owned and operated stations presumably want to obtain the most popular programming. We do not believe that network ownership would result in stations' refusing to transmit programming of intense local interest in order to clear a less desirable part of the network feed. Network ownership of additional affiliated stations is thus unlikely to hamper the formation of additional part-time networks.

b. Diversity

100. Some commenters[121] allege that network ownership will reduce diversity. We find their arguments unconvincing. INTV claims that the network and its affiliates have different editorial voices, and that diversity would therefore be reduced by a combination. The networks reply that they are organized in a decentralized fashion, and that their local owned and operated stations are editorially independent. As discussed previously, we believe that, in general, decisions concerning local coverage are made by individual stations, whether affiliated or network owned.[122] Furthermore, much of the national and international component of news programming comes from the networks now. Thus, it appears that any loss in editorial viewpoint diversity would be minimal. In any event, the number of alternative viewpoints available to any viewer in a local market would be unaffected by network ownership of a station currently affiliated with it.

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[118] Network Inquiry Special Staff, Federal Communications Commission. *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October 1980). Vol. I at 399.

[119] *DOJ Comments* at 24-25.

[120] *See* Network Inquiry Special Staff, Federal Communications Commission. *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October 1980). Vol. II at 262.

[121] See, *e.g. Comments of the Association of Independent Television Stations, Inc.* in Gen. Docket No. 83-1009 at 7-8; and *Reply Comments of Turner Broadcasting System, Inc.* in Gen. Docket No. 83-1009 at 7-10.

[122] *See* para. 52-53, *supra,* and accompanying notes.

101. The Motion Picture Association of America charges that owned and operated stations carry less "independently-produced" programming than affiliates, and that this situation would be exacerbated by increased network ownership of stations.[123] CBS counters that owned and operated stations carry less "Hollywood" programming because they do more locally produced public affairs and news.[124] We have observed, above, that the danger of the networks adopting a foreclosure strategy is slight. In this context, we must give deference to the programming judgment of station managers. If owned and operated stations choose to carry more locally produced or station group produced programming than, say, the average affiliate, we have no basis for assuming that this is an anticompetitive or diversity-reducing result.

c. Advertising Markets

102. A few commenters raised the possibility that network ownership of additional stations might facilitate collusion or tie-in transactions in the advertising market place. We are persuaded by the analysis of the Department of Justice that these allegations are without merit.[125] Whatever degree of coordination exists among the networks is due to their comprehensive and parallel groups of affiliates. The Department of Justice points out that the structure of the market for national advertising will be unchanged by network acquisitions.[126] Justice concludes that the spot market is a separate one, so that network acquisitions would not affect the national market. Thus, we conclude that the networks' dominant position in the national advertising market would not be affected by additional owned stations. Indeed, if anything, advertising markets will become more competitive after the Rule is relaxed. Justice pointed out that spot rates provide a loose constraint on network rates, but that the greater transaction costs put them in a separate market. Thus, if larger non-network groups do form, this could reduce the transactions costs of assembling wide area coverage via the spot market, and actually put more pressure on network rates.

103. The allegations that network ownership of additional stations might allow networks to exploit tie-in arrangements between network and spot advertising or between network and syndicated programming are unsupported by evidence or logic. The networks have each owned five large market stations for many years and no evidence of this behavior has surfaced. Furthermore, no explanation is presented of why competition

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[123] *Comments of the Motion Picture Association of America, Inc.* in Gen Docket No. 83-1009 at 2-6.

[124] *Reply Comments of CBS, Inc.* in Gen. Docket No. 83-1009 at 6-9.

[125] *See DOJ Comments* at 19-26 and *Reply Comments*, of the United States Department of Justice in Gen. Docket 83-1009 (February 21, 1984) at 3-10.

[126] *DOJ Comments* at 19-23.

among networks and with independent stations would not prevent these alleged abuses.

104. These considerations suggest to us that the networks have little opportunity for acquiring market power or facilitating collusion by purchasing additional stations. Thus, as the Department of Justice concludes, they will be unwilling to pay more than the market price for any station. To the extent that there are *bona fide* efficiencies associated with group ownership, certain stations will be worth more to the networks as groups than to other buyers. Hence, the networks will likely be able to acquire some stations. However, contrary to the contention of TRAC, networks will have no special incentive or ability to acquire affiliates in order to gain total programming control without paying a fee to the affiliate. Nor will networks have any special power (or incentive) to force affiliates to sell by threatening them with loss of affiliation. The one alleged example of this behavior occurred thirty years ago and was stopped by judicial action.[127]

d. The Case for Equal Treatment

105. Although network ownership of additional stations would not have the advantage of stimulating additional nationwide programming (since the networks already provide a full schedule), the networks offer other reasons for not treating them differently. First, they claim that their stations are particularly well-managed and provide an unusually large amount of local programming.[128] Thus, they imply that it would be beneficial if their superior management skills and organization were spread over more stations. It is clear that network-owned stations have rendered meritorious service to their local communities, and it is possible that this service is tied to the management and support resources provided by the parent company. It is possible that network owned stations are able to attract particularly talented management personnel due to the possibilities for advancement to the network.

106. Second, the networks assert that it is unfair and unwise to discriminate against them *vis a vis* other program packagers. Cable network companies, for example, are not limited in vertically integrating by owning cable systems. Broadcast networks are not only limited in their ownership of television stations but are currently prohibited from owning

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[127] *See National Broadcasting Co., Inc.*, 37 FCC 427 (1964), which chronicles a dispute dating from 1954.

[128] *See, e.g., Comments of National Broadcasting Company, Inc.* in Gen. Docket No. 83-1009. January 19, 1984, at 130-133 and *Comments of CBS Inc.* in Gen Docket 83-1009. January 19, at 49-60. The owned and operated stations also produce some programming of general interest, but our syndication and financial interest rules limit their incentives to do this. The consent decrees entered into by the three networks with the Department of Justice provide additional limitations.

cable systems,[129] although cable network companies are not prohibited from owning television stations. The networks point out that currently they account for only 55 percent of programming expenditures.[130] They assert that they are in stiff competition for programming with the non-broadcast media now[131] and are entitled to equal treatment.

107. Together with these potential benefits we add our earlier conclusions: 1) that the case for repeal of the rule has been made, and 2) that the case for treating the networks differently has not been made. There has been no demonstration that the benefits we perceive from increasing group ownership will be adversely affected by allowing networks to increase their station ownership.[132] Equally, we have not been convinced of the alleged dangers of increased network ownership. In short, we have no basis for imposing additional restraints upon the networks. To place such a cap on the networks might, therefore, be construed as arbitrary and capricious, unsupported by the record before us.

IV. Conclusion

108. We believe the record in this proceeding convincingly establishes that the appropriate market for ideas is primarily local, and includes a broad variety of means of communication, especially cablecasting, newspapers, and opinion magazines, in addition to radio and television; that, to the extent the idea market is a national one, it is sufficiently diverse so as to be unaffected by a change in the Seven Station Rule; and that network and group owners contribute to viewpoint diversity through the quality and quantity of their public-affairs programming. Further, the record establishes that there is no danger of excessive economic concentration in the relevant competitive markets, and that there are potential efficiency gains from repeal of the rule. Finally, we believe the record shows that

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[129] This rule is under reexamination. *See Notice of Proposed Rulemaking* in CT Docket 82-434, 91 FCC 2d 76 (1982).

[130] *Reply Comments of CBS Inc.* in Gen. Docket 83-1009 February 21, 1984 at 12.

[131] *Reply Comments of American Broadcasting Companies, Inc.* in Gen. Docket No. 83-1009. February 21, 1984 at 10-17.

[132] We believe that there will be ample opportunity for non-network groups to expand and realize these benefits, including an increase in diversity of programming, even though they may have to bid against the networks for stations. While those groups might prefer to be insulated from network competition in the bidding, we are not in the business of subsidizing non-network groups, or for that matter, network groups. Our presumption is that broadcasting firms should be free to structure themselves in the most productively efficient manner in response to marketplace demands, provided that our diversity goals are met. In view of our conclusions on the importance of the local market for diversity, the large number of outlets nationwide, the likely expansion of non-network groups, and the *bona fide* efficiencies of network ownership, we see no danger that equal treatment for the networks will thwart the diversity benefits of increased non-network group ownership.

repeal of the rule will not have an adverse effect on minorities, that there are other, more appropriate and effective vehicles for achieving minority objectives, and that separate restrictions on the three national networks are neither justified nor wise. Accordingly, we are eliminating the Seven Station Rule, and replacing it with a temporary ownership limitation, in the belief that the public interest will be substantially benefited by this action. However, the Commission will continue to scrutinize each acquisition to assure itself that the acquisition does not contravene any of the Commission's public interest concerns, particularly those related to diversity and competition.

109. We recognize, in addition, that the communications marketplace is undergoing rapid change. Prudence and caution thus call for a transition that provides for monitoring and special scrutiny of sharp departures from the current status of the broadcast industry.

110. Nevertheless, as discussed above, we recognize the concerns of some commenters that, if the rule were repealed immediately and in its entirety, a significant restructuring of the broadcast industry might occur before all ramifications of such a change became apparent. While the record contains no evidence of potential harm from the ownership changes that would be made possible by immediate repeal of the rule, out of an abundance of caution, the Commission is establishing a transitional limitation for a period of six years during which multiple station ownership in each broadcast service will be capped at a numerical limit of 12. We do not encourage waivers of the 12 station limitation during its six year existence.[133]

111. Raising the ceiling to a twelve station transitional limitation is reasonably related to the expansion in the number of broadcast facilities that has occurred since the rule of sevens was adopted; indeed, it is conservative in comparison to the industry's growth. Accordingly, we believe that this modification is fully justified as a cautious first step while we look toward eventual elimination of this transitional limitation. Also, by raising the existing numerical cap, the Commission will provide all group owners with some flexibility to acquire new properties. This approach will give the Commission a better opportunity to examine the dynamics of a less regulated marketplace than would an approach that constrained growth among the larger group owners.

112. The telecommunications marketplace is undergoing rapid growth. Undue regulatory intervention can be one of the most significant hindrances to assuring that the public receives the best possible service from the telecommunications scheme adopted by Congress. It is the Commission's

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[133] By law, however, we cannot preclude consideration of waiver requests. However, a waiver applicant during this transition would face a "high hurdle." *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

belief that this transitional approach will permit immediate implementation of the benefits of increased group ownership as supported by the record. The next six years will permit detailed scrutiny of the demand for, and effects of, increased group ownership as well as permit time for further development of some of the alternative telecommunications media discussed in the Order. While this decision may be criticized as unduly conservative in light of the Commission's conclusion that the national ownership ceiling is no longer warranted, we believe that this approach sufficiently meets the needs of the present, while permitting the agency to take a second look to ensure that total elimination of the rule is fully warranted.

113. Authority for the rule changes adopted herein is contained in Sections 4(i) and (j), and 301, 303, 308 and 309 of the Communications Act of 1934, as amended.

114. Accordingly, IT IS ORDERED, that effective 30 days from the date this Report and Order is published in the Federal Register, Part 76 of the Commission's Rules and Regulations is amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Subpart H, 73.3555, paragraph (d) is deleted.

2. In Subpart H, a new Section 73.4285 is added to read as follows:

§73.4285 National Multiple Ownership of Broadcast Stations.

See Report and Order in Docket No. 83-1009, FCC 84-350, adopted July 26, 1984, _____ FCC 2d _____, 49 Fed. Reg. 31877, August 9, 1984.

July 26, 1984

STATEMENT OF MARK S. FOWLER, CHAIRMAN

Re: Elimination of Seven-Station Rule

One of my major objectives as Chairman has been to make the rules governing the broadcast industry more rational. Today's decision is a sensible, and sizeable, step in that direction.

The seven-seven-seven rule was a wholly artificial principle. It took a snapshot of the broadcast industry's structure as it was in 1953 and then left the industry in freeze frame for over 30 years.

Based on the many comments we received, and in particular the views of the Department of Justice, today we put the industry back in motion. We have removed the artificial seven-station restriction. This will give

those who wish to grow in broadcasting the opportunity to do so. At the same time, in an abundance of caution, we have adopted a transitional limitation of 12, which will apply for the next six years.

During that time period, we will be able to watch the growth of the industries. At the end of this period, unless we find there is undue concentration the 12-station transitional limitation will disappear. Broadcasting will then be able to rejoin the family of American businesses under the general laws that regulate competition, no longer arbitrarily singled out for straight-jacket treatment.

I want to address two points raised in Commissioner Dawson's dissent that I think unfairly attack this decision. Let me say, first, that Commissioner Dawson and I appear to agree on the major points: that the seven-station rule was arbitrary and that, eventually, all rules that limit station ownership on a nationwide basis should be eliminated. Our disagreement relates to the transitional mechanism to reach the point of eliminating the rule, and how long that transition should take.

Commissioner Dawson criticizes the decision for adopting a fixed number —12 — as a ceiling instead of a percentage of TV households (25% for VHF ownership, 30% overall ownership). She argues that while 12 is as arbitrary as 7, a percentage is a more intellectually rigorous test. But what I find unpersuasive in this argument is that her proposed percentage test measures only TV households. It excludes without justification video competitors to over-the-air television such as cable, SMATV, MDS, and video cassette. More significant, it excludes all competitors to broadcast television for the relevant national and local advertising dollar without a reasoned explanation. Her percentage test is an arbitrary numerator in search of an undefined denominator. Short of a flat-out elimination, which we will get to in six years, the rule of 12 was viewed by the rest of the Commission as a sensible guidepost. Any limit in this area is bound to be somewhat arbitrary; but simply adding "%" to a limit does not make it more scientific.

Similarly we found that six rather than three was an appropriate time for a transitional limitation. The extra time we felt was more appropriate in light of the sunset that will occur at the transitional period's end.

In addition, Commissioner Dawson faults the decision for not distinguishing among different players, in particular, the three commercial networks, in proposing limits for new growth. As we make clear in our analysis, there was no basis for treating these licensees differently. As to the networks' "reach" into the overall TV households because of the affiliate structure, bear in mind that the vast majority is due to the stations they do not own; clearance rates for network shows do not vary substantially as between network owned and nonowned stations. In light of these facts, I must ask why we are so concerned about trying to

somehow control "reach" and why some wuld have this Commission "grab" the usual, network, suspects and treating them differently without basis.

More to the point, and on this Commissioner Dawson agrees, the relaxation and eventual elimination of these rules will allow more competition to the three networks. New combines can form new production centers to offer more programming for television. Strong group ownership is generally acknowledged as the predicate for more program competition, on a local and national basis. While there is no magic in group ownership that insures better service, the sharing of costs that can go on among more stations is likely to permit larger scale program undertakings. Local coverage of political conventions this year is an example of undertakings that become more realistic when costs for common expenses among group-owned stations are shared.

It is commonplace in Washington to remind one another that bigness is not necessarily badness. Today we bring that maxim to the broadcast ownership context. Bigness is not necessarily badness, sometimes it is goodness, sometimes it is just bigness and nothing more. But without a good reason to forbid growth, this Commission should not just utter the magic word "Television" and treat the industry differently. By today's order we stop doing exactly that.

SEPARATE STATEMENT OF COMMISSIONER PATRICK

Re: Amendment of Commission's Seven Stations Rule.

I endorse the Commission's decision in this proceeding to increase the seven station limit to twelve on an interim basis and, in six years' time, to sunset the rule assuming no adverse impact upon the national broadcasting market is observed in the interim period.

The voluminous record in this matter provides ample support for the Commission's conclusion that there is no basis for imposing a national ceiling on broadcast ownership based on our public interest concerns and criteria, especially diversity, economic concentration and the impact on minorities. I will briefly touch on each of these in turn.

On the issue of diversity, it is my belief that this is more properly a *local* ownership issue. Diversity involves the number of different perspectives any individual hears or sees. For any given individual, that is a function of how many different voices are available in his or her local market. Diversity is, therefore, unaffected by whether station owners also own stations in other markets. It is our duopoly and one-to-a-market rules that foster local diversity, and not our national ownership restrictions.

Even if we assume *arguendo* that there is a national diversity issue, the evidence strongly suggests that our action today will not threaten that diversity. First, the television and radio markets are diversity rich. Since the time the rules were adopted in 1954, the number of licensed stations has increased 561% for FM, 92% for AM and 466% for TV. Because of this increase, owning 12 stations today still represents a lower percentage of the total number of television or radio stations than owning 7 stations did in 1954.

The influx of new, competitive media into the marketplace underscores the conclusion that the market is diversity rich — and becoming more so every day.

Finally on the issue of diversity, I note that there is little evidence to support the assertion by some that increased group ownership is inimical to diversity. The evidence shows, instead, that stations owned by group owners are run on a largely automonous basis as to editorial policy and non-entertainment programming generally. Thus, group ownership does not lead to the spread of a monolithic perspective. The evidence also demonstrates that group owners frequently have the financial resources to do greater amounts of news and public affairs programming than do smaller owners. Indeed, the evidence shows that group owners on average spend up to 7% more of their time each broadcast day on non-entertainment programming. I am not suggesting that group owners should be preferred over smaller owners, only that group ownership is not necessarily inconsistent with diversity and, in fact, may foster increased diversity.

The second major public interest concern that the record in this proceeding lays to rest is economic concentration. In general, the broadcast market is a very unconcentrated market. The Department of Justice (DOJ) applied its Herfindal-Hirschman Index (HHI) to the television and radio markets and found that each was well below the minimum level at which concentration becomes a potential antitrust concern. On a scale of near zero to 10,000, DOJ considers 1000 to constitute that minimum level of concern. DOJ calculated the concentration rating for the top 12 television owners to be 229 and for radio to be 77. These figures demonstrate just how unconcentrated the industry is.

The Department of Justice also specifically concluded that abolishing the 7 Stations Rule would cause no adverse competitive impact in either the local spot or national advertising markets. Indeed, one of the principal advantages of our action in this proceeding is that, by removing an artificial barrier to expansion, we provide opportunities for *increased competition.* By allowing independent group owners room for additional growth, they can begin to compete with the networks in the national advertising and program markets.

The third area of concern examined in the Report & Order is the impact of this rule on minorities. The record demonstrates that the 7 Stations Rule was never intended nor has it had the effect of deflating the market such that minorities who might not otherwise have sufficient funds can purchase stations. I believe the Report & Order appropriately concludes that it is not the Commission's role to artificially deflate market prices through regulation. Instead, our efforts should be focused on assisting minorities to obtain the necessary financing to enter into the broadcasting industry.

In concluding that lifting the rule will not harm any of these public interest concerns, we can take comfort in the fact that both executive agencies that commented in this proceeding — the National Telecommunications and Information Administration and DOJ — concluded that abolishing the rules will pose no threat to our paramount public interest concerns.

Even with a record supporting complete abolition of a national ownership ceiling, the Commission has determined to proceed in a modest and cautious manner. Rather than abolishing the rules outright, we have established a six-year, interim period during which we moderately raise the ceiling. Doing so will allow us to evaluate the ensuing pattern of purchases and impact on the market. Importantly, our choice of a numerical station limit will allow *all* players in the market — networks, large group owners and small independents — to purchase stations. In turn, we will have the opportunity to observe the patterns and effects, thereby acquiring the data that will be necessary for evaluating the impact of our decision before sunsetting the interim limit.

A ceiling of 12 stations might be called arbitrary. All ceilings are somewhat arbitrary. If, however, the 12 station limitation is seen for what it is intended to be, *viz.*, an interim device to permit sufficient station acquisitions to allow the Commission to analyze the effects of lifting the rules, then it is not an arbitrary measure, but a reasonably prudent and cautious interim step to a deregulated marketplace. By adopting a sunset of six years, moreover, the Commission has allotted itself a sufficient length of time for acquisitions to occur so that we may conduct a meaningful evaluation of the effect of relaxing the rules before the sunset occurs. If that evaluation leads us to a different conclusion than we reach today, we will be able to take corrective action.

I also take comfort from the fact that it remains a Commission obligation to evaluate every acquisition pursuant to our public interest criteria, which include diversity and competition. Thus, what we are doing today is not "abandoning ship" or indicating a willingness to close our eyes to diversity and concentration concerns. What we are doing here is

raising and then eliminating a ceiling that has functioned as an arbitrary barrier to competition.

Finally, I would like to comment on the use of reach to set an interim limit, which the dissent to our decision would adopt as a preferable method. Although at first blush the concept of reach has a certain amount of appeal, after careful analysis I have concluded that it is not preferable to an interim station cap.

First, reach is no less arbitrary than a station cap. Why 25%? Why not 35%? It still sets an arbitrary limit over which we prohibit acquisitions without reference to particular circumstances. I am also not sure that reach is any more relevant to our public interest concerns. With respect to diversity, the local market is of paramount concern. National reach is irrelevant to that concern. With respect to economic concentration, the relevant factor would seem to be not reach but audience *share.* Economic concentration is only relevant to the extent that it reflects market power. If a station has a 75% reach but 0% share, surely no concentration concern is raised.

Another problem with reach concerns the very goal the dissent seems determined to further: slowing or capping the networks while allowing independent group owners to grow. A 25% reach ceiling would, however, also limit those large independent group owners who are in the best position to compete with the networks with further growth.

Second, and more fundamentally, it is inappropriate as a matter of public policy for the government to limit the growth of one group, while allowing another to grow, unless there is evidence that growth by the former group is harmful to the public interest. There is no such evidence here. The networks' dominance in the national market is a function of their *affiliate* arrangements. Allowing the networks to own additional stations will have no material impact on the affiliate structure and the strong market position resulting therefrom.[1]

Third, by effectively limiting network acquisitions to one or very few stations by using reach, the interim period cannot be used to monitor and evaluate the effects of relaxing the rule prior to sunset — because the rule would only be significantly relaxed as to some of the players. For those who fear network power, therefore, the dissent's proposal is a riskier course, in that it gives the Commission little if any opportunity to evaluate the impact on the market of additional purchases by the networks before setting them free of all restraints — which would occur, under the dissent's proposal, in a short 3 years.

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[1] Interestingly, the dissent does not include the networks' affiliates in its reach computations. If reach is the relevant measure, it would seem difficult to ignore affiliate stations, given that they provide networks with 97% prime time and 87% daytime programming clearance.

I am thus confident that the Commission's decision to establish a transitional 12 station limit for six years presents a better transition eliminating the rule. The evidence in this proceeding supports the conclusion that there is no continued justification for the rule. Nevertheless, the Commission has decided to proceed in a prudent manner that will permit us to monitor and evaluate the impact of permitting all players to increase their acquisitions before the rule sunsets. Our prediction is that there will be no adverse impact. On the contrary, we hope and expect our decision to foster increased competition. For these reasons, I applaud and support the Commission's decision.

DISSENTING STATEMENT OF *COMMISSIONER MIMI WEYFORTH DAWSON*

By today's action,[1] the Commission has lost an important opportunity to correct inequities created by previous Commission intrusion into the broadcast market. Equally important, the Commission has lost the opportunity to create a sound record on which to base the ultimate elimination of the Commission's national ownership restrictions.

Unfortunately, the Report and Order, which adopts a twelve-station rule, does not depart from the arbitrary, irrational restrictions of the past. A twelve-station rule continues to equate a TV station in New York City, the nation's largest market, with a TV station in Glendive, Montana, the nation's smallest. A twelve-station rule continues needless restriction on the radio industry which the record shows to be both diverse and competitive.[2] The rule of twelve is too limiting for some and too liberal for others. Seven was and twelve will continue to be unfair to non-network group owners and will, therefore, limit hoped-for incentives for greater diversity in news, informational and entertainment programming as well as the benefits which rigorous competition could provide to the American people.

A central theme that has permeated the Commission's ownership rules — and, ironically, a theme that permeates the majority's opinion — is that group ownership facilitates and is necessary to the establishment and

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[1] Amendment of Section 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, _____ F.C.C.2d _____ (1984) [hereinafter *Majority Decision*]. The decision terminates a rulemaking proceeding instituted by the Commission last year. Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 48 Fed. Reg. 49438 (1983) [hereinafter *NPRM*].

[2] My comments herein are limited almost entirely to television. After a review of the comments in this proceeding — and, indeed, a review of the *Majority Decision* — I can find no credible justification for retaining a limit for radio ownerships, much less the same numerical limit as imposed on television. *See infra* at 14-15.

growth of permanent or ad hoc networks. As Metromedia, Inc. said in its comments in this proceeding:

> A broader base of owned stations would permit Metromedia and other group owners to invest in new program initiatives and to mount more effective competition against the dominant national networks. Additional sources of programming would be of particular benefit to independent stations which, after prospering through the use of off-network re-runs, now face an era of growing program scarcity.

Comments of Metromedia, Inc. at 3.

This analysis was even articulated by the Commission in the Notice in this proceeding. The Commission noted that the seven-station rule "may actually limit the 'diversification of program and service viewpoints' that it was intended to advance." *NPRM* at para. 38. This was so, the Commission said, because the numerical limitation "may in some instances preclude the possibility of realizing the benefits inherent in program production or acquisition for large audiences":

> Ownership of a sufficient number of stations to generate a base for quality program production might well facilitate development of a new over-the-air television network in the future. It is likely in any case to lead to expanded production of programming, including non-entertainment programming, for national, regional, and group presentation to the viewing and listening publics. The access to a larger potential audience which a group owner enjoys reduces the level of difficulty involved in getting initial distribution of an unproven first-run show or series, cuts marketing expenses, and assists in generating revenues that could be used to finance even more attractive, higher quality programming. Cooperative production or distribution by larger groups is another possible vehicle by which enhanced programming options can be provided.

Id. (footnotes omitted).

In the past, the Commission has been criticized for making precipitous major policy shifts. An appropriate transition mechanism can serve to develop a record which meets this criticism. However, the use of an inappropriate measurement can only exacerbate this criticism and may lengthen the Commission's regulatory intrusion into this area.

What would be an appropriate measurement to develop this record? The Justice Department in its comments has suggested such a measurement based on audience:

> The product supplied by conventional over-the-air and advertiser supported cable television presents unusual problems in market definition because viewers, the apparent consumers of television, are actually the "product" sold to advertisers, the real purchasers in the television marketplace. Programming, the apparent product of television, is merely an input into generating audiences. Broadcasters compete to obtain programming that will produce the largest audiences with the demographic advertisers.

Department of Justice Comments at 10.

The Justice Department also states that "[t]he threshold issue is the degree of substitutability between television advertising and advertising through other media . . . if advertisers would readily respond to a price

increase in television advertising rates by shifting to advertising on other media, then these other media are in the same market."[3] *Id.* at 11. My colleagues and I grappled with various approaches. Certainly reasonable people can differ but I have come to the reluctant conclusion that the majority's failure — by measuring the number of stations rather than audience — to follow the Justice Department's description of the relevant measurement is a fatal flaw in the majority's approach. I must therefore respectfully dissent to the Report and Order.

Rather than a approach which counts the number of stations, I would formulate an interim approach which would look at the potential television audience. This approach would:

(1) Allow television station ownership in any combination of stations up to 30 per cent of the nation's television households. No more than 25 per cent of this reach could be through VHF television stations.[4]

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[3] The Department found, though, that this substitutability does not exist to any great degree, largely because of "the greater impact on audiences of visual commercial messages than print or aural messages," and the fact that television "reaches a higher percentage of the population than any other media form." *Id.* at 12.

[4] This measurement could be accomplished through various easily obtainable sources: Arbitron ADI figures for television households; similar data from A.C. Neilsen; Grade B population data; or net weekly circulation figures. For convenience, I have used Arbitron ADI television household data for the calculations contained in this statement. According to this ADI data, for example, ABC's owned and operated VHF stations in New York, Los Angeles, Chicago, San Francisco and Detroit reach 17,430,700 television households, or 20.75 per cent of the 83,971,800 television households in the United States. *1983-84 ADI Market Guide* XIII. This represents the highest VHF reach of any group owner. Major group owner's current reach, as calculated from information in the *1983-84 ADI Market Guide* and from the 1984 *Broadcasting Yearbook* is as follows:

Licensee	*Current VHF Reach*	*Current UHF Reach*
ABC	20.75%	0%
CBS	20.57%	0%
NBC	19.85%	0%
Metromedia	16.96%	6.93%
RKO	13.53%	0%
Westinghouse	10.08%	.77%
Capital Cities	7.01%	1.64%
Chris Craft	6.10%	0%
Gannett	5.44%	2.30%
Cox Communications	5.15%	3.53%
Taft	4.43%	4.77%
Scripps-Howard	4.15%	.85%

Thus, under my proposal, group owners could additionally acquire television stations — in whatever number — with the following reach:

(2) Impose no limitation on the ownership of radio stations.

(3) Expire at the end of three years unless specifically extended by the Commission.

(4) Require the Mass Media Bureau to monitor radio and television acquisition and report within two and a half years to the Commission and to Congress on the effect of the rule on media concentration, minority ownership and UHF ownership.[5]

I believe such a transition mechanism would more readily meet the goals of competition and diversity than majority's substitution of a twelve-station rule for a seven-station rule.

1. *Correcting Commission-Created Inequities*

The reach approach avoids the inherent unfairness of a numerical limit based on the number of stations owned, an unfairness perpetuated by the majority. The numerical approach has restrained, and will continue to restrain, the growth of group owners vis-a-vis the major networks. This growth has been restrained, not because of any collusive or anticompetitive behavior on the part of the networks, but because of the ownership patterns established very early in the history of broadcasting together with the Commission's own policies.

Licensee	*Available VHF Reach*	*Available UHF Reach*
ABC	4.25%	5%
CBS	4.43%	5%
NBC	5.15%	5%
Metromedia	6.11%*	0%
RKO	13.35%	5%
Westinghouse	14.92%	4.23%
Chris Craft	18.90%	5%
Gannett	19.56%	2.70%
Cox Communications	19.85%	1.47%
Taft	20.57%	.23%
Scripps-Howard	20.85%	4.15%
Capital Cities	20.92%	4.55%

As indicated, I would maintain a revised VHF/UHF distinction, not only to encourage UHF ownership but also as recognition of the business reality that, even though the gap has narrowed considerably, UHF continues to operate at a technical and economic disadvantage.

* The Metromedia VHF figure assumes current UHF ownership; if the UHF holdings were reduced to five per cent or below, Metromedia could acquire VHF stations totalling 8.04 per cent.

[5] Just as the majority's 12-station rule does not seek somehow to quantify and include alternative video delivery mechanisms, the reach concept I have proposed is limited to the reach of commercial terrestrial television stations and does not - and need not - seek to measure and include cable, SMATVs, MDS, DBS, video discs and video cassette recorders. See Department of Justice Comments at 12.

In the early 1950s, fewer than 100 television stations were licensed and on the air in this country. Of these, the networks, which had pioneered the development of television, already owned attributable interests in 15 television stations in the largest television markets — virtually the same stations the networks own today.[6] Through these facilities, each network was able to reach, through owned-and-operated stations, substantial segments of the nascent, but growing television audience.

Two FCC policy decisions at about this same time virtually assured that no non-network group owner would be able to reach the level of the audience base available to the networks. The first of these, as identified by the Commission's network inquiry staff, was the 1952 table of allocations.[7] As the Commission's network inquiry staff noted, the allocation plan "seriously handicaps a fourth and additional networks by limiting their coverage and forcing them to affiliate with UHF stations in markets with many viewers." *Federal Communications Comm'n, Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (vol. 1) 139 (1980) [hereinafter *Network Inquiry*].

The second of these decisions was the seven-station rule which, of course, limited the number of VHF television outlets any entity could own — no matter what the size of the market in which the station was located — to five.[8] The effect on non-network group owners' ability to accumulate an audience base comparable to the networks was devastating. As the Commission's own network inquiry staff concluded, the rule "without apparent justification" permitted:

> certain firms to acquire substantially more powerful and profitable facilities while owners of other, less powerful, outlets [were] constrained in their ability to expand. As currently constructed, the set of rules often may serve only to impair the realization of efficiencies in the use of television outlets.

Network Inquiry at 362.

A dual handicap was thus imposed on non-network group owners with national programming ambitions. They were foreclosed from obtaining VHF outlets (because of the Commission's allocation policies) in most of the major markets, and they were restrained by a numerical limitation imposed by the Commission which prevented them from accumulating a comparable audience base by acquiring more than 5 VHF stations in

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[6] NBC and ABC owned the same television facilities as they now own. CBS owned the stations it presently owns in New York, Chicago and Los Angeles, but owned attributable interests in what is now WDVM (TV), Washington, and WCCO-TV, Minneapolis, rather than its current television properties in Philadelphia and St. Louis.

[7] Amendment of Section 3.606 of the Commission's Rules and Regulations, 41 F.C.C. 148 (1952).

[8] Amendment of Sections 3.35, 3.240 and 3.636 of the Commission's Rules and Regulations, 18 F.C.C. 288 (1953).

smaller markets. From 1953 to 1984 the Commission's numerical limitation has failed to realize the Commission's goals: to encourage competition and diverse points of view.[9] *NPRM* at para. 38. And yet, this Commission by its action today again relies on a number of stations ceiling when we have clear evidence that such a scheme has proven to be ineffective in the past.[10]

The majority today has simply reaffirmed the fundamental unfairness of numerical limitations and set the stage to allow some group owners to get comparatively larger while condemning other small group owners to remain comparatively small. This is not to say that the major networks could not acquire more stations under the reach approach. But measuring reach does not perpetuate the unfair proportional constant established by earlier Commission policy.

2. *Arbitrariness and Irrelevance of Numerical Limitations*

A numerical limitation is not only arbitrary, it is irrelevant. The absolute number of radio and television stations owned by a given entity is of substantial interest only to the FCC. Network and station advertising rates are set not according to an aggregate number of stations but according to the size of the audience reached by stations or networks. Thus, the number of stations any entity owns is wholly irrelevant to the production of competitive programming on a national level. As Metromedia, Inc. indicated in its comments in this proceeding,

> National advertisers require clearance in at least 75% of the nation's television homes before they will commit to a program. Because Metromedia is prohibited from owning stations in more than seven key national markets, it is *totally* dependent upon the views and preferences of other licensees in its efforts to launch a national program.

Comments of Metromedia, Inc. at 25 (emphasis in original).

Thus, the key to increased production of competitive programs lies not in the number of stations owned but in the size of the potential audience of the stations owned.

The Department of Justice, whose comments are so heavily relied upon by the majority, recognizes that the television business is concerned not with the number of stations but with the number of viewers:

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[9] This double handicap was largely blamed for the failure of the DuMont Television Network. *See, e.g., Bochin, The Rise and Fall of the DuMont Network,* in *L. Lichty and M. Topping, eds., American Broadcasting* 190-92 (1975).

[10] This dual handicap also helps to explain the fact that no group owner has been able to approach, through VHF station ownership, the audience coverage of the network owned-and-operated stations. For example, even though Westinghouse currently owns five VHF stations, those five stations reach only 10.08 per cent of ADI television households. Similarly, Taft's five VHF stations reach only 4.43 per cent of ADI television households. Even the four VHF stations owned by Metromedia, the largest of the non-network group owners, reach only 16.96 per cent of ADI television households. *See supra* note 3.

> Programming, the apparent product of television, is merely an input into generating audiences. Broadcasters compete to obtain programming that will produce the largest audiences with the demographic characteristics most highly valued by advertisers. Advertisers acquire time on program to deliver commercial messages to audiences. The price of audiences is measured in terms of dollars per thousand viewers per unit of time.

Comments of the Department of Justice at 10 (footnote omitted).

Thus, it is not surprising that, based on the number of stations owned, limits have been consistently criticized as arbitrary and meaningless. For example, twice the United States Senate has considered legislation to substitute population percentage for numerical limits.[11] A variety of commenters has spoken of the arbitrariness of a numerical limitation.[12] The Commission's own network inquiry staff was highly critical of numerical limits on station ownership.[13] The 1953 Commission, in adopting a seven-station limitation, was aware of the fundamental arbitrariness

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[11] In 1947, the Chairman of the Senate Commerce Committee, Wallace White, introduced a bill to bar the Commission's use of numerical limits and substitute instead a rule that no entity could own or control stations "which in the aggregate provide a primary service . . . for more than 25 percentum of the population of the continental United States as determined in the last preceding decennial census." S. 1333, 80th Cong., 1st Sess. (1947). In 1956, in the wake of the demise of the Dumont Network, Senator John Bricker of Ohio introduced a population coverage limitation for television similar to that proposed by Senator White in 1947. S. 3859, 84th Cong., 2d Sess. (1956). Senator Bricker intended the substitution of a percentage limitation for the "sterile abstraction" of a seven station limit "entirely unrelated to factors of population and markets covered" in order to encourage competition for the networks by independent station groups. It is important to note that this approach was dismissed largely because of the difficulty of applying the concept of then-preeminent AM radio stations which operate under widely varying powers and conditions. This difficulty is not true of television, which is now the Commission's primary concern, because of the similarity of television station coverage patterns and the available of a variety of audience measurement devices. *See supra* note 4.

[12] For example, one commenter has noted that "[t]here is no real basis for the number five or seven, and it makes little sense to equate a station in Butte with one in New York City." Geller, *FCC Media Ownership Rules: The Case for Regulation*, 32 *J. of Comm.* 148, 155 (1982).

[13] The network staff found that:

> the Commission's group ownership rule, by its reliance on number of stations rather than market share implicity views the group ownership of commercial broadcast stations located in New York City, Los Angeles and Chicago as posing the same threat of monopoly behavior in the national market as the group ownership of stations in Hazard, Kentucky, Hibbing, Michigan and Clovis, New Mexico.

Federal Communications Comm'n, Network Inquiry Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (vol. 1) 362 (1980).

of picking a number.[14]

Perhaps most remarkable, this Commission, in the notice adopted in this proceeding, criticized the arbitrariness of numerical limits on broadcast station ownership. Indeed, the notice said that the:

> effect of population disparities can . . . be depicted by noting that one station in New York City can potentially reach more people than one station in each of the seven markets between 14 and 20. To equal the potential reach of a New York City station, one would need to own one station in each of the bottom 86 markets. While an owner of stations in each of the top seven markets can reach 27.5 per cent of the U.S. population, stations in each of the bottom seven markets collectively reach less than one-half of one per cent of the population. This data makes clear the arbitrary nature of the "seven station" rule.

NPRM at Paragraph 36 (footnote omitted). Yet, the Report and Order now chooses to ignore the preponderance of criticism — including its own — of numerical limits and substitute a "twelve-station" rule for a "seven-station" rule.

The majority does not explain why or how it has arrived at the number twelve. It says only that the new numerical limit "is reasonably related to the expansion in the number of broadcast facilities that has occurred since the rule of seven was adopted." *Majority Decision* at para. 111.[15]

However, as the Second Circuit reminded the Commission in *Office of Communications of the United Church of Christ v. Federal Communications Commission*, 560 F.2d 529 (2nd Cir. 1977), there is a limit to which an administrative agency can simply pick a number out of thin air without explanation.[16] There, the Commission had sought to raise the employee cutoff for the requirement of filing annual equal employment reports from five employees to ten. However, the Court of Appeals reversed the Commission and suggested that when an administrative agency attempted to change an initial arbitrary limitation, it must articulate reasons for doing so. As the court said, "[w]hen initial cut-off or threshold criteria for determining the applicability of particular regulations are

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[14] The Commission, concerned primarily with what it considered the impracticality of applying a reach standard to the then-preeminent AM service, concluded that a number was the "only sound and workable one because of the history and present development of the broadcast industry." Amendment of Sections 73.35, 73.240 and 73.636 of the Rules and Regulations to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953).

[15] If the Commission is concerned about maintaining a numerical limit based on the relative growth of stations, then the correct number for television stations would be 14 and the correct number for radio would total 36. *See* Comments of Storer Communications, Inc. at 3; Comments of the National Radio Broadcasters Ass'n at 5.

[16] Even the 1953 Commission was not without its reasons for choosing the number seven. Indeed, seven had been a tacit limitation for AM since 1945 when the Commission disallowed CBS' acquisition of an eighth AM facility. Moreover, only minimal divestiture of other facilities was required. *See* Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 *Fed. Comm. B.J.* 1, 12-15 (1974).

involved, the agency's reasoning need at times consist only of 'practical considerations of administration,' . . . since there are times when arbitrariness is inevitable." 560 F.2d at 532 (citations omitted). However, the court determined that when an agency seeks to change even an arbitrary policy, "such changes in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored . . . and that [the agency] is faithful and not indifferent to the rule of law." *Id.* (citation omitted) Thus, the court concluded:

> the FCC did not have the leeway that may be given an agency in the initial promulgation of cut-off criteria for the applicability of regulations. We deal here with a change in such criteria, and hence we must find that the FCC had a rational, articulated explanation for its action in order to uphold its decision.

Id. at 532-33. Similarly, in the instant case, the majority has given no reason for choosing twelve as opposed to any of the other numbers suggested by commenting parties.[17]

3. *Perpetuation of needless regulation*

The majority's decision perpetuates rather than diminishes regulation — not just with regard to the length of the sunset provision,[18] but with regard to radio. The situation with regard to radio is markedly different from television, and, thus, I believe deserves different treatment or at least an explanation of why it is being treated the same as television. As the Department of Justice pointed out in its comments:

> Since the radio industry is much less concentrated than the television industry, both in terms of the number of stations and the number of networks, it is even less likely that elimination of the seven station rule will result in adverse competitive effects in the radio industry . . . . Unlike television, . . . network radio advertising is not dominated by only three sellers. In radio, there are over 90 national and regional radio networks . . . . [B]ecause there are so many more radio stations than television stations, and because radio stations typically affiliate with more than one radio network, potential new radio networks are not faced with a limited number of non-network stations from which to form a network.

Department of Justice Comments at 26-27.

In light of such arguments, I can find no persuasive reason to impose an arbitrary, numerical limitation on radio ownership, much less that radio be saddled with the same restrictions as television, and no such reason is offered in the majority's decision. Accordingly, I would impose no restriction on multiple ownership of radio stations.

In sum, while I applaud my colleagues for ending the seven-station rule, I see little benefit in the substitution of a twelve-station rule, which continues the policy of the Commission's 1953 decision. I believe this policy has proven to be irrelevant, arbitrary and inherently unfair. The

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[17] For example, various commenting parties suggested numerical limits of 10, 14, and 36. *See supra* note 13.

[18] *See supra* at _____.

twelve station rule remains remarkably regulatory with regard to radio, and the length of the interim rule. And, accordingly, I respectfully dissent.

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART, DISSENTING IN PART

I dissented from the Notice of Proposed Rulemaking in this proceeding[1] not because I objected to reviewing and revising the "seven station rule." I was not, and am not, completely opposed to change. Instead, I objected to initiating this review because the philosophy espoused by the Commission majority represented a profound and dangerous reversal of the FCC's long-held emphasis on media ownership diversification, and because the Notice of Proposed Rulemaking appeared to make repeal of these rules a foregone conclusion.[2] Frankly, I also believed that, by taking the unusually strong stand of dissenting from a rulemaking proposal, I might successfully inject moderation into an enterprise whose candid aim was "to reduce our national broadcast ownership restrictions . . . to the maximum extent feasible."[3]

Although I disagree in several fundamental respects with this *Report and Order,* I believe today's action, insofar as it maintains a national multiple ownership rule and cap, is a moderate response. Undeniably, this moderation is the byproduct of political considerations. Undeniably, the new transitional rule lacks the elegance of some proposals made in this proceeding. Nonetheless, I can concur in this *Report and Order* to the extent it embodies a continued and *firm* — albeit imperfect — restraint on national multiple ownership. Such restraint is absolutely essential to preserve our bedrock federal commitment to media diversity, and I lend my support to that part of this order.

On the other hand, I must register my strong disagreement with the philosophical underpinnings of this decision. First, contrary to the *Report and Order,* I believe there is considerable public value in policies which promote national media ownership diversity, and a multiple ownership rule is one way of doing that. As this Commission once said: "Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public

[1] *See Multiple Ownership of Broadcast Stations,* 95 FCC 2d 360, 400-05 (1983).
[2] *Id.* at 400-01.
[3] *Id.* at 395.

to the use of radio and television facilities."[4] I subscribe to that philosophy.

Second, this public good cannot be safeguarded absent responsible FCC regulation and oversight. Therefore, it is essential that a reasonable limitation be retained until all groups in our society are broadly represented in the ownership structure of the media. For this reason, I dissent from the decision to sunset the new rule in 1990. We have no way of knowing now if all groups will be represented in our ownership structure in a meaningful way by that time.

Third, a policy which emphasizes the programming contributions of groups owners at the expense of small broadcasters, as this *Report and Order* does, sets a dangerous First Amendment precedent because it suggests that the only diversity worth having is that of the large media conglomerates. As the D.C. Circuit recently was forced to remind this Commission, "a small 'new voice' may do more to further the First Amendment than a loud or large 'old voice'.[5] I second that conviction wholeheartedly.

These deficiencies notwithstanding, there has been undeniable growth in the number of outlets and owners competing in the nation's marketplace of ideas — especially in radio — since the seven station rule was adopted in 1953. It does not seem unreasonable, therefore, or inimical to the public interest goals to which I subscribe, to permit some upward adjustment of the rule. A liberalized rule, if firmly adhered to, may create a proving ground for some of the theories expounded in this *Report and Order.* My colleagues have specified in the item itself, and to me personally, that they are willing to adhere to this cap. I am satisfied that the cap is a real one.

The more difficult issue, of course, is where and how to redraw the line limiting multiple ownership. In this regard, the rule adopted today has two significant defects: the failure to impose a ceiling on television ownership penetration; and the failure to carry forward a UHF/VHF dichotomy like that of the present seven station rule. I am, therefore, forced to dissent on these two failings. With regard to the first issue, I believe a penetration ceiling is warranted in television above and beyond the flat numerical limitation approved by the Commission. Television is the dominant information medium in this country. Therefore, in revising the ground rules governing television station ownership, our actions must be marked by extreme caution. In a system in which television access to the public remains limited, there is no sound reason to permit on entity to own stations reaching more than 25 percent of the country, regardless of

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[4] *See Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 394 (1965) (footnote omitted).

[5] *Committee for Community Access* v. *FCC,* 737 F.2d 74 (D.C. Cir. 1984).

how few stations are involved.[6]

I also object to the decision to abandon our policy of encouraging UHF television ownership. That policy was promulgated to enhance diversity in the video arena. Its abandonment at this time can only slow the development of UHF and, as a result, reduce future diversity. Finally, I have already stated, I dissent from the decision to sunset this new rule in 1990. I hope the Commission sees fit to revisit these matters on reconsideration.

[6] This limitation finds support in prior congressional initiatives. *See* S. 1333, 80th Cong. 1st Sess. (1974); S. 3859, H.R. 10524, H.R. 10733 and H.R. 10756, 84th Cong., 2d Sess. (1956).

Ownership Minority
Ownership Monopoly
Ownership of Stations, Limitations on
Satellite Station, Television
UHF Development Policy
UHF Operation

Memorandum Opinion and Order adopted establishing new national multiple ownership limits for radio and television b/cing by amending Part 73 of the Rules. Group owners will be allowed to have cognizable interests in a maximum 12 AM, 12 FM and 12 TV stations. In addition, group owners of television stations will be allowed to have cognizable interests in TV stations reaching a maximum of 25% of the national audience. Additional rules have been established for groups having cognizable interests in UHF and minority controlled stations.

—*Amendment of Section 73.3555*
Gen. Docket No. 83-1009

FCC 84-638

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations	Gen. Docket No. 83-1009

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1984; Released: February 1, 1985

BY THE COMMISSION: CHAIRMAN FOWLER CONCURRING IN PART; COMMISSIONER DAWSON CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER RIVERA CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER PATRICK DISSENTING IN PART AND ISSUING A STATEMENT.

1. Before the Commission are petitions for reconsideration of the *Report and Order* [1] in the above-captioned proceeding, filed by the following parties: Association of Program Distributors ("APD"); Cox Communications, Inc. ("Cox"); Hubbard Broadcasting, Inc. ("Hubbard"); the Motion Picture Association of America, Inc. ("MPAA"); the National Association of Television Program Executives, Inc. ("NATPE"); the National Black Media Coalition ("NBMC"); Victory Television, Inc. (Victory); and Westinghouse Broadcasting and Cable, Inc. ("Group W").[2] Pleadings responsive to these petitions have been filed by various parties.[3] Before addressing the specifics of these pleadings, we shall briefly restate our initial decision and then summarize the actions we are taking here to amend that decision.

2. In the *Report and Order,* the Commission considered whether or not to repeal or modify the national multiple ownership rule commonly known as the "seven station rule." Under this rule a single individual or entity was prohibited from holding a cognizable ownership interest in more than seven AM, seven FM and seven TV broadcast stations (of

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[1] *Report and Order* in Gen. Docket No. 83-1009 (*"Report and Order"*), FCC 84-350, 49 Fed. Reg. 31877 (August 9, 1984), *appeal docketed sub nom. Black Citizens for Fair Media v. FCC,* No. 84-1503 (D.C. Cir. filed October 9, 1984).

[2] The National Association of Black Owned Broadcasters ("NABOB") filed an untimely Petition for Reconsideration accompanied by a Motion for Acceptance of Late-Filed Petition for Reconsideration. Section 405 of the Communications Act of 1934, *as amended,* and the counterpart provisions of Section 1.429(d) of our rules, require petitions for reconsideration to be filed within 30 days of the date on which public notice is given of the underlying order. 47 U.S.C. §405 and 47 C.F.R. §1.429(d). Because we lack authority to waive the requirements set forth in the Act, we must deny NABOB's motion. While we cannot consider NABOB's pleading as a formal petition for reconsideration, we note that the Commission has, in other contexts, treated late filed petitions as informal comments to a proceeding. We believe it appropriate to treat NABOB's pleading in a similar fashion.

Metromedia, Inc. ("Metromedia") did not request reconsideration of the Commission's action, but did file a statement in response to the *Report and Order.*

[3] Parties filing in opposition to or commenting on the reconsideration petitions were: (1) American Broadcasting Companies, Inc. ("ABC"); (2) Association of Independent Television Stations, Inc. ("INTV"); (3) Black Citizens for Fair Media, League of United Latin American Citizens, National Association for the Advancement of Colored People, National Association for Better Broadcasting, National Conference of Black Lawyers Communications Task Force and the Telecommunications Research Action Center, filing jointly ("BCFM *et al.*"); (4) Capital Cities Communications, Inc. ("Capital Cities"); (5) CBS, Inc. ("CBS"); (6) Cox Communications, Inc. ("Cox"); (7) Lorimar Productions, Inc. ("Lorimar"); (8) National Association of Broadcasters ("NAB"); (9) National Broadcasting Company, Inc. ("NBC"); (10) Spanish International Communications Corporation ("SICC"); (11) Taft Broadcasting Company ("Taft"); and (12) Turner Broadcasting System, Inc. ("TBS"). Replies were filed by the National Association of Independent Television Producers and Distributors ("NAITPD"), Cox and MPAA. A late response was filed by the Association of Maximum Service Telecasters ("MST").

which no more than five could be VHF stations).[4] After careful review of the extensive record in this proceeding, we determined that repeal of the seven station rule would not adversely affect the Commission's traditional policy objectives of promoting viewpoint diversity and preventing economic concentration. Indeed, we found that elimination of the rule might well further these objectives. We concluded that repeal of the seven station rule was, on balance, in the public interest. We also recognized, however, that the complete and abrupt elimination of our national multiple ownership rules might engender a precipitous and potentially disruptive restructuring of the broadcast industry. Therefore, we elected to adopt a transitional limit of 12 AM, 12 FM and 12 TV broadcast stations per owner. This transitional limit was to terminate automatically six years from the effective date of the *Report and Order* unless intervening Commission experience indicated that retention of the rule was required. On August 9, 1984, the Commission stayed the effective date of the *Report and Order*, insofar as it relates to TV station ownership, until 60 days after the reconsideration in this proceeding or until April 1, 1985, whichever occurred later.[5] We also note that Congress enacted a moratorium on the implementation of the *Report and Order*.[6]

3. On reconsideration, we are convinced that our underlying conclusions in the *Report and Order* remain correct. We nonetheless believe that certain aspects of our initial action should be modified. In particular, we now believe that, in addition to the existing 12 station limit, a new TV station multiple ownership restriction, based on a percentage of national audience reach, should be adopted. This new audience reach limit would allow group owners to expand to the point where their TV stations have access to no more than 25 percent of the national audience. Moreover, we find that this new audience reach limit should be tailored to account for the distinct characteristics of UHF television stations. Further, we believe that both the audience reach and numerical station limits should be adjusted to promote minority ownership of broadcast facilities. Finally, we believe that the sunset to the national multiple ownership rules should be eliminated.

SUMMARY OF PETITIONS FOR RECONSIDERATION

4. While the issues raised on reconsideration are complex and varied, certain fundamental conclusions of the *Report and Order* have not been challenged by any petitioning party. None of the petitioners dispute our determination that the seven station rule should be revised. In addition,

[4] 47 C.F.R. §73.3555(d), deleted in *Report and Order, supra* n.1.

[5] *Order* in Gen. Docket No. 83-1009, FCC 84-400, 49 Fed. Reg. 32581 (August 15, 1984).

[6] *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, §304, 98 Stat. 1369, 1423 (1984).

none of the petitioners object to our conclusion that these revisions should permit some degree of increased group ownership. Furthermore, the arguments raised in the petitions, for the most part, are restricted to television broadcasting. With one exception, the petitioners do not specifically question any of the determinations made with regard to the relaxation of the restrictions on multiple ownership of radio stations. We turn now to a brief summary of the major issues raised in the petitions for reconsideration.

5. *Network Ownership.* Alleging that the networks dominate television broadcasting, MPAA, APD and Victory oppose any repeal or relaxation of the seven station rule as it applies to the networks. MPAA defines television as a distinct product market, and claims that the 1953 allocation scheme essentially insulates the networks from competition by making it impossible for a fourth network to effectively compete by acquiring sufficient VHF stations in the largest markets. Petitioner also asserts that the growth in independent stations has not eroded network dominance. Moreover, the petitioner claims that alternate video technologies will not provide the networks with sufficient competition in the forseeable future. On the contrary, MPAA contends that repeal of the rule could impair the growth of these technologies by enabling the networks, which are already beginning to invest in new technologies, to exert greater market control over their development.

6. MPAA, APD and Victory contend that, as a policy matter, repeal of the seven station rule will diminish the opportunities for new independent programming, ad hoc networks and the development of a fourth network. MPAA, APD and Victory claim that the *Report and Order* failed to take into account the differences between affiliated stations and owned and operated stations. Specifically, they assert that affiliates have a greater economic incentive to pre-empt network programming and purchase programming from independent producers than do network owned stations. The petitioners contend that the difference in clearance rates between owned and operated stations and affiliated stations provide independent producers with a "window of opportunity" for access to prime time programming which is essential to the viability of alternative networks. APD warns that the foreclosure of independent programming will be further exacerbated as the internal production limitations in the Justice Department's consent decrees are phased out.[7] Victory specifically claims that additional network acquisitions will have "dire" consequences for the production and syndication industries.

7. MPAA, APD and Victory assert that increased network ownership will subvert the prime time access rule. In this connection, they argue that increasing the number of owned and operated stations provides networks

[7] *See* para. 28, *supra.*

with an incentive to produce "local in-house" programming for use by these stations during the prime time access period. This, in turn, will reduce the number of stations to which independent producers might market their programs and will therefore lower the incentive of such producers to create and distribute independent programming. Moreover, this adverse effect on independent program sources will be exacerbated by the fact that newly acquired network owned and operated stations are likely to be in the large television markets that are most important to independent producers in marketing their programs. Further, they contend that the incentive to produce their own programming will reduce the networks' need for independent programming during other day parts where there are traditionally lower clearance rates. NATPE also expresses concern over the prime time access rule, criticizing the Commission for failing to study carefully the potential impact on the prime time access rule before taking action to modify the seven station rule.

8. MPAA asserts that there is no evidence to support the contention that the networks' owned and operated stations provide superior performance when compared with other non-network group owned stations. The petitioner also disputes our conclusion that the networks do not impose monolithic viewpoints on their owned and operated stations. Furthermore, MPAA asserts that the Commission has emphasized the quality and quantity of programming contrary to our traditional concepts of diversity which focus on independent ownership rather than program content. Similarly, MPAA challenges the notion that network growth would result in greater management efficiencies and better programming. MPAA contends that there is no evidence to suggest that superior management skills are confined to the networks. On the contrary, MPAA states that non-network groups may be doing a superior job because they are forced to match programming to local tastes and to garner audiences without the benefits of networking.

9. MPAA also alleges that elimination of the seven station rule as applied to the networks will increase economic concentration and anticompetitive activity in both the advertising and program acquisition markets.[8] The petitioner contends that increasing network ownership of stations will restrict the development of the national spot advertising market. MPAA argues that the networks, by purchasing affiliates in the larger markets, will be able to control or eliminate spot advertising in markets with the greatest audience reach. Such acquisitions will prevent national spot advertisers from clearing the larger markets, thereby eliminating the emerging national spot market as an effective competitive restraint on

[8] In this respect, MPAA suggests that the Commission should consider the acquisition of additional broadcast outlets in different geographic markets as market extension conglomerate mergers. *Id.*

network advertising prices. MPAA also claims that an increase in network ownership enhances the danger of collusion among the three networks by making it easier for them to fix both local and network advertising rates.

10. MPAA also states that increased network ownership of stations will have adverse economic consequences on the program acquisition market since the unique economic incentives of an owned and operated station will provide a greater incentive for networks to behave in an anticompetitive manner. For example, MPAA asserts that network owned stations could, by raising their advertising rates, cause advertising to shift to independent stations, thereby driving up the price of independent advertising time. This, in turn, would permit the networks to raise the prices of programming that they supply to independent stations and thus to increase network profits. Alternatively, MPAA contends that, by warehousing the best programming, the networks could reduce the quality of programming available to independent stations and thereby reduce the audience — and advertising revenues — of these stations. The resulting increased demand for advertising on network owned stations would permit the owned and operated stations to raise their advertising rates.[9]

11. *Adoption of an Audience Reach Cap.* In addition to the twelve-station numerical cap, Group W and Cox urge the Commission to add an ownership limit based on audience reach as measured by Arbitron Area of Dominant Influence (ADI) data. Group W requests that the Commission adopt a VHF audience reach cap of 25 percent, whereas Cox urges adoption of a 27.5 percent limit. While not proposing a specific percentage for the audience cap, MPAA urges the Commission to adopt an audience reach limitation for non-network group owners that will ease the existing restrictions. In this regard, MPAA argues that it is incumbent upon the Commission to increase the opportunities and incentives of non-network owners to compete effectively against the networks.

12. *UHF Discount.* In establishing an audience reach cap, Group W, Cox and MPAA each propose that the Commission adopt rules which take cognizance of the difficulties faced by UHF stations. Both Cox and Group W propose an additional reach limit of 2.5 percent for UHF stations. While not proposing a specific percentage, MPAA urges the Commission to establish a "slightly higher" market penetration cap for non-network group owners with substantial UHF interests.

13. *Minority Incentives.* NBMC and MPAA urge the Commission to promote minority ownership in broadcasting by including specific incentives in the ownership rules. NBMC urges the Commission to adopt

[9] As MPAA acknowledges, these arguments presuppose repeal of existing Commission rules which generally preclude networks from participating, either directly or by financial interest, in the program syndication market. *See* 47 C.F.R. §73.658(j).

the minority ownership policy contained in H.R. 6134.[10] This House bill provides for a five percent increase in the audience reach cap and a corresponding increase in the numerical station ownership limitation proposed in the bill for persons acquiring interests in stations in which minorities hold ownership interests exceeding 50 percent. MPAA asserts that the Commission should take cognizance of the special contributions minorities make to viewpoint diversity by permitting a "slightly higher" market penetration for non-network group owners with substantial minority interests.

14. *Radio Ownership.* NBMC requests the Commission to eliminate the current ownership distinction between AM and FM stations. Instead it urges the Commission to adopt a single standard which would limit ownership to 14 radio stations without regard to station type.

15. *Satellite Station Exemption.* Hubbard requests the Commission to create an exemption from any numerical limits that may be adopted by the Commission for stations which are primarily operated as satellite stations. It contends that the adoption of its proposal will encourage the development of over-the-air television service to smaller communities.

16. *Sunset Provision.* Several parties specifically request the Commission to reconsider its decision to adopt a six year sunset provision. Because the Commission has no means in which to accurately predict marketplace conditions in 1990, Group W asserts that the Commission's adoption of a sunset provision is at odds with its oversight responsibilities mandated by the Communications Act. MPAA states that it is unrealistic for the Commission to expect effective competition to the networks to develop during the short transition period. NBMC claims that the Commission will be unable to assess the actual impact of the relaxation of the rule because broadcasters will purposefully avoid anticompetitive behavior during the six year transition.

DISCUSSION

A. Network Expansion and Relaxation of the Seven Station Rule

1. Viewpoint Diversity

17. In support of its assertion that the Commission should continue to apply the seven station rule to the networks, MPAA argues that our decision to repeal the rule relied on a diversity analysis at serious odds with traditional diversity concepts. It contends that the Commission erred in relying on considerations such as the quality and quantity of programming in its diversity analysis,[11] stating that such reliance "departs from proper insistence on objective quantification of ownership as the sole

[10] H.R. 6134, 98th Cong., 2d Sess. §1 (1984).

[11] *Petition for Reconsideration of Motion Picture Association of America, Inc.* at 25.

criterion for implementing multiple or cross-ownership restrictions."[12] Moreover, MPAA suggests that the Commission must give controlling weight to diversity considerations in assessing the need to retain or revise the national multiple ownership rules.[13]

18. We disagree. The Commission has traditionally recognized that revision of the national multiple ownership rules necessarily involves a balancing of diversity considerations with other competing policy objectives. Thirty years ago, the Commission stated that:

> Clearly if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station to any one person or persons under common control would best serve the public interest. But, of course, that is not the case. The multiple ownership of broadcast stations does play an important role in our nation-wide broadcast system. The ownership of broadcast stations in major markets by the networks, for example, is an important element of network broadcasting. Our nation-wide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted. We have always recognized these needs and have by rule permitted multiple ownership of broadcast stations in the light of such (other and competing) considerations. Here too it is our view that the greater good which will flow from the proposed rule offsets the disadvantage resulting from permitting individual licensees to own a larger number of stations.[14]

The courts have also recognized that diversity is not absolute. Ultimately, after consideration of all relevant factors, the Commission must evaluate whether or not its decision maximizes service to the public.[15] Moreover, the *Report and Order* did not substitute a concern with diversification of ownership for one that is predicated solely on the presentation of certain kinds of programming. Rather, our decision balanced the need for a presumptive rule equating ownership diversity at the national level with viewpoint diversity against the demonstrable benefits of group owner-

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[12] *Id.*

[13] To the extent MPAA contends that the Communications Amendments Act of 1982 (lottery provision) requires retention of the seven station rule or some particular form of national multiple ownership restriction, we find its contentions unpersuasive. The statute itself is silent on the matter and the legislative history of that statute provides no support for the contention that Congress, in enacting the subject provisions, was concerned with the national multiple ownership rules, or that it mandated retention of the seven station rule. *See* H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 40 (1982); *Initial Reply Comments of Cox Communications, Inc.*, filed February 21, 1984.

[14] *Report and Order* in Docket No. 10822, 43 FCC 2797, 2801-2 (1954).

[15] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 710, 804-805 (1978). Even assuming, *arguendo*, that we modified our traditional analysis to consider actual programming, petitioners present no reason why such an approach is beyond our discretion in the context of a rulemaking proceeding. We are not presented here with a situation where previously articulated policies are being applied to facts involving specific litigants in adjudicatory contexts. *See, e.g., Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). Within the context of a rulemaking proceeding, the Commission has broad discretion in analyzing relevant facts in reaching its decision.

ship.[16] In the context of this balancing process, we found that national ownership diversity is not of primary relevance in promoting viewpoint diversity. In this regard we noted that

> the most important idea markets are local. . . [N]ational broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.[17]

The petitioners have presented no new facts or arguments which warrant reconsideration of the conclusion contained in the *Report and Order* that repeal of the seven station rule in its entirety would not impact adversely on the diversity of viewpoints.

19. MPAA bases its arguments concerning the need for partial retention of the seven station rule to restrain network growth upon the alleged dominance of the networks in the television market. Disputing the Commission's finding that the information market is the relevant product market, MPAA states that in considering viewpoint diversity, the Commission should separately assess the television market which it characterizes as pervasive, unique and concentrated.

20. We decline to adopt MPAA's narrowly defined product market. As we stated in the *Report and Order,* the television market is not the appropriate product market for diversity purposes. In that decision, we found that there exists a broad product market that is comprised of numerous information sources,[18] including cable television, newspapers, magazines and periodicals.[19] We determined that these media compete with broadcast outlets for the provision of information.[20] Indeed, the fact that different media are important and viable substitutes for each other is reflected in our local cable and television, newspaper and broadcast, and radio and television cross-ownership rules.[21] The fact that the various

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[16] *Report and Order* at para. 62.

[17] *Id.* at para. 60. *See also id.* at para. 32, *supra.*

[18] In the *Report and Order,* we observed that there were 4747 AM stations, 4717 FM stations, 1169 TV stations and 6400 cable television systems. *Report and Order* at paras. 34-35. Moreover, since the adoption of the seven station rule, our data indicate that the number of radio stations, television stations and cable systems has increased by 301 percent, 587 percent and 4267 percent, respectively. *Id.* Furthermore, we stated that the relevant product market includes a number of emerging technologies, such as multipoint distribution systems, subscription television stations, direct broadcast satellite service and video cassette recorders. *Id.* at para. 35. We also noted that the evidence of record reflects that there are 1711 daily newspapers, 4742 non-daily newspapers, 1500 consumer magazines and 4507 other periodicals. *Id.* at para. 25. *See also Notice of Inquiry* in Gen. Docket No. 84-282, FCC 84-140 (released May 8, 1984) at para. 38.

[19] *Report and Order* at para. 25.

[20] *Id.*

[21] *See* 47 C.F.R. §73.3555(b) [one-to-a-market]; 47 C.F.R. §76.501 [co-located cable-broadcast TV cross-ownership]; and 47 C.F.R. §73.355(c), [co-located newspaper-broadcast cross-ownership].

media may not be perfect substitutes for one another does not negate their status as competing, antagonistic sources of information for the purposes of diversity analysis. In sum, MPAA offered no new evidence to rebut our finding that the relevant market here is the information services market. Moreover, MPAA does not argue that the networks or any other information service provider is dominant in the product market which the Commission has found to be the relevant one for diversity purposes, nor has it challenged our findings concerning the exponential growth in the number of broadcasting and information outlets in that market. We continue to believe, therefore, that the vast increase in the number of information services is an important factor which attenuates the need for a presumptive national ownership rule as a means of assuring diversity.[22]

21. Similarly, we do not accept petitioner's arguments that we improperly balanced the benefits of group ownership against our traditional diversity concerns. MPAA argues that an increase in the diversity of ownership on a national level necessarily results in an increase in the diversity of independent viewpoints and, conversely, any station acquisition by a group owner decreases viewpoint diversity. For the reasons set forth in the *Report and Order,* we disagree with the petitioner's analysis. In our decision, we found that the uncontroverted evidence contained in the record indicates that group owned stations do not impose monolithic viewpoints on their various holdings. To the contrary, we noted that the economics of each local market require autonomous decisions by each station with respect to its editorial judgments.[23]

22. Even assuming that there is some slight reduction in viewpoint diversity at the national level, however, the petitioners have presented no new evidence which effectively challenges our finding that this detriment

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[22] We also note that none of the petitioners challenge our conclusion that the local market is the primary market for purposes of diversity analysis. As we found in the *Report and Order,* the area from which consumers can select mass media alternatives is the local market and to this extent national ownership restrictions bear no necessary relation to the number of antagonistic information outlets available in any particular local market. *Report and Order* at para. 32.

[23] *Report and Order* at para. 52. MPAA asserts that the Commission, in adopting its co-located cross-ownership rules, rejected the notion that truly autonomous voices can emanate from the same corporation. *See Report and Order* in Docket No. 18110, 50 FCC 2d 1046 (1975), *aff'd sub nom. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978). In context, the Commission found it unrealistic to expect effectively diverse voices from commonly-owned information providers operating in the same geographic market and thus in direct competition with one another. In this proceeding, however, we found the local market to be the primary geographic market for diversity purposes. Since the duopoly and one-to-a-market rules would preclude multiple ownership of information sources in the same local market, the commonly-owned facilities at issue in this proceeding — unlike those in Docket 18110 — are not direct competitors in any relevant geographic market.

is outweighed by the substantial benefits of group ownership. We found that group ownership affirmatively promotes diversity of viewpoints by promoting organizational forms which facilitate new programming; consequently, we concluded that the seven station rule, in operation, may actually inhibit new programming which enhances diversity in local markets.[24]

2. Economic Competition

23. In the *Report and Order,* we concluded that repeal of the rule of sevens would not promote economic concentration.[25] We adopted the conclusion of the Department of Justice that "elimination of the Seven Station Rules will raise little risk of adverse competitive effects in any market," and that "license transfers involve no significant competitive risk merely because the result is common ownership of more than seven stations in a broadcast service."[26]

24. The *Report and Order* adopted the analysis of the Department of Justice that advertising markets are essentially comprised of two distinct submarkets: the national advertising market and the local spot market.[27] The petitioners on the record before us provide no substantive evidence to dispute this market definition. We found that repeal of the rule of sevens would have little or no effect on national advertising rates since the networks, through their affiliates, and not their owned and operated stations, already reach most markets throughout the country. As a result, the purchase of an affiliate by a network would have only a *de minimis* impact on concentration in the national advertising market.

25. In response, MPAA argues that the national spot market serves as a competitive check against network advertising rates. This petitioner and others contend further that if the networks are allowed to purchase their affiliates, an important vehicle for the development of a competitive national spot market will be foreclosed because owned and operated stations have lower clearance rates for independent programs than network affiliated stations. They argue that lower clearance rates will decrease the available time for the national spot market while increasing network advertising revenues.

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[24] *Report and Order* at para. 57. In addition, the petitioner has presented no evidence controverting our previous analysis regarding the program performance of group owners. *Id.* at para. 62.

[25] We note that the evidence contained in the *Report and Order* relative to the low concentration levels of the television broadcast market remains undisputed. Specifically, the Herfindahl-Hirschman Index for the national television market is only 229 based on revenue and 115 based on audience share. These concentration figures are far below the levels at which antitrust concerns are triggered. *See United States Department of Justice Merger Guidelines,* issued June 14, 1982.

[26] *Report and Order* at para. 65, *quoting Comments of the Department of Justice* at 23.

[27] *Id.* at para. 69.

26. We find these contentions unpersuasive. Of particular significance is the fact that they fail to establish the necessary link between increased network ownership and foreclosure of the national spot market.[28] In any event, we agree with the Department of Justice that neither the local spot or emerging national spot markets are viable substitutes for the national network advertising market. Even assuming, *arguendo,* that the national spot market is a substitute for network advertising, the petitioners are unable to isolate or quantify the extent of any competitive harm resulting from network acquisition of their affiliated stations. Accordingly, petitioners fail to present any persuasive evidence that repeal of the national ownership rules, even as to the networks, would impair economic competition in the national advertising market.

27. MPAA also alleges that repeal of the seven station rule will provide greater opportunities for network collusion with respect to national and regional advertising prices. Specifically, MPAA cites to *United States v. American Broadcasting Co.,* No. 74-3600-RJK (C.D. Cal. filed July 21, 1976) as evidence of the network's proclivity to collude with respect to national spot and local advertising.[29] MPAA argues that the more local markets in which the networks face each other as owners and operators of local stations, the greater access they would have to immediate and detailed information about each others advertising and programming actions thereby making it easier for them to collude. In addition, MPAA observes that the networks will have a greater opportunity to raise network advertising rates as they exert greater control over an increasingly large proportion of spot audiences in all markets.

28. We note that the 1976 stipulation in *United States v. American Broadcasting Co.* referred to by MPAA was accompanied by a specific Justice Department declaration stating that the government did not charge the networks with collusion among themselves in any form, express, tacit or otherwise.[30] Subsequent Justice Department pre-trial pleadings in that case alleging network collusion, upon which MPAA also relies, lack any probity since these allegations have never been established in a court. Indeed, these allegations resulted not in an adjudication

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[28] The empirical evidence submitted by MPAA is far from conclusive. The petitioner estimates that increased network ownership will decrease spot market inventories on affiliated stations by 17.4 percent. This extrapolation, however, fails to indicate the percentage of the "national" spot market that is dependent on affiliates pre-empting network programming. Moreover, its analysis fails to establish that the spot market is an effective substitute for network advertising or that other advertising substitutes are not available to provide a competitive check on network advertising rates. *See Opposition of CBS, Inc. to Petitions for Reconsideration,* App. E.

[29] *Petition for Reconsideration of Motion Picture Association of America, Inc.* at 35.

[30] *Response of American Broadcasting Companies, Inc. to Petitions for Reconsideration,* Exh. C.

of collusion by the networks, but in consent decrees in which the networks and the Justice Department agreed to an entry of a final judgment "without trial or adjudication of any issue of fact or law herein, and without this final judgment constituting any evidence against or admission by any party with respect to any issue of fact or law in any action or proceeding."[31] Moreover, because network owned and operated stations already compete in the top three television markets, there is no reason to believe that an incremental increase in information that may be derived from direct competition in other markets would suddenly trigger collusive behavior by the networks. In any event, as MPAA's citation in *United States v. American Broadcasting Co.* demonstrates, any such collusive behavior among the networks would be policed by the Antitrust Division.[32]

29. MPAA also alleges that repeal of the seven station rule, as applied to the networks, would impair competition in the program acquisition market and hurt independent stations through increased network control of the program syndication market. It asserts that the networks could manipulate advertising prices and warehouse quality programming to the detriment of independent stations. Petitioner's arguments presuppose the repeal of the Commission's existing financial interest and syndication rules. Because these rules remain in force, we disagree with petitioners analysis. Even if one assumes the repeal of these rules, however, MPAA's arguments have already been rejected once by the Commission.[33] Moreover, as noted in the *Report and Order,* the effect on the amount of time available to non-network programmers would be marginal at best.[34] In

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[31] *United States v. American Broadcasting Co., Inc.,* No. 74-3600 (C.D. Cal.), *consent decree reported in* 45 Fed. Reg. 58441, 58442 (Sept. 3, 1980). *See also United States v. CBS, Inc.,* No. 74-3599-RJK (C.D. Cal.), *court entry of final judgment reported in* 45 Fed. Reg. 34464 (May 22, 1980); *United States v. National Broadcasting Co, Inc.,* 449 F. Supp. 1127 (C.D. Cal.), *aff'd mem.,* 603 F.2d 227 (9th Cir. 1978), *cert. denied sub nom. CBS, Inc. v. United States,* 444 U.S. 991 (1979), *consent decree reported in* 41 Fed. Reg. 51191, 51193 (Dec. 10, 1980).

[32] The Department of Justice has indicated that it would monitor and take appropriate action against such collusive behavior. *See Comments of the United States Department of Justice* at 25, n.52. With respect to the argument by MPAA that the Commission should consider the acquisition of added broadcast outlets in different geographic markets as market extention conglomerate mergers, we anticipate that the Department of Justice will also monitor such acquisitions. In addition, as MPAA acknowledges, we stated in the *Report and Order* that "the Commission will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particularly those related to diversity and competition." *Report and Order* at para. 5.

[33] *See Tentative Decision and Request for Further Comments* in BC Docket No. 82-345, 94 FCC 2d 1019 (1983), at paras. 164-174.

[34] Several petitioners have also argued that increased network ownership will subvert the prime time access rule. No persuasive evidence has been presented demonstrating that,

any event, even if owned and operated stations do choose to broadcast more in-house locally produced programming than the average affiliate, we do not believe that this is anticompetitive *per se.*[35]

3. Conclusion

30. We find that the petitioners have not demonstrated that retention of the seven station rule is necessary to effectuate the Commission's policy of promoting viewpoint diversity. Similarly, we conclude that the petitioners have not shown that the seven station rule is needed to prevent undue economic concentration. Since the petitioners have failed to controvert our conclusion that a total elimination of the seven station rule is appropriate, they cannot have demonstrated that a partial retention of the rule for selected industry participants is either necessary to achieve our policy objectives or is otherwise in the public interest.[36]

31. Moreover, petitioners' arguments are apparently couched in terms of the alleged harms which would result from either a total repeal of the seven station rule or a relaxation of the regulation to permit the networks to acquire 12 TV stations. As we explain below, however, in addition to the twelve station limit prescribed by our *Report and Order,* we are adopting on reconsideration an audience reach cap of 25 percent. Because network owned and operated stations are generally concentrated in highly populated areas and therefore already have significant population penetration,[37] this reach restriction will preclude substantial network expansion. Thus, while the reach cap is not specifically directed to any particular industry group,[38] its adoption necessarily attenuates the alleged detrimental

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in the absence of a national multiple ownership rule, the networks would necessarily shift to inhouse production for prime time access programming. Moreover, given the modest expansion allowed by the rules adopted herein, we do not believe that the prime time access rule will be jeopardized.

[35] *See* para. 28, *supra.*

[36] In our policies limiting multiple ownership at the local level, which are almost as old as the Commission itself, we have never discriminated among specific industry participants. To the contrary, the local duopoly and one-to-a-market rules have always been applied in an even handed manner to all types of owners. *See* 47 C.F.R. §73.3555(a), (b). Prior to their repeal, the regional multiple ownership rules also did not selectively differentiate among station owners. *See Report and Order* in MM Docket No. 84-19, FCC 84-156 (released May 1, 1984), *appeal docketed sub nom. National Association for Better Broadcasting v. FCC,* No. 84-1274 (D.C. Cir. filed June 7, 1984). Similarly, since the adoption of the seven station rule more than thirty years ago, the limitations embodied in our national multiple ownership have been applied in a uniform manner to all industry participants. *See Report and Order* in Docket No. 8967, 18 FCC 288 (1953).

[37] The three networks are among the four largest group owners in terms of audience reach. The current audience reach of ABC, CBS, and NBC is 20.76 percent, 20.59 percent and 19.79 percent, respectively.

[38] Our decision to retain a relaxed national multiple ownership rule is predicated upon a concern regarding the potential impact on industry structure rather than upon a

impact of network expansion which the petitioners perceive will result from a relaxation of the rule.

32. In summary, we reaffirm the conclusions contained in our *Report and Order* that relaxation of the seven station rule should be extended to all industry participants and that elimination of the rule will have no adverse impact on viewpoint diversity or economic concentration. We now turn to a discussion of the matters in which reconsideration is warranted.

B. Revision of the Report and Order

33. After reviewing the petitions for reconsideration filed in this proceeding, we now find it appropriate to modify certain aspects of our *Report and Order.* In this regard, we now find our modification of the rule should be revised to better account for the effect that this relaxation will have on population penetration. We also find that the *Report and Order* should be revised to take cognizance of the limitations inherent in UHF broadcasting and to promote our traditional policy of facilitating minority ownership. In addition, we find that a more appropriate approach is to eliminate the automatic sunset provision contained in our previous decision.

1. Adoption of Combined Numerical and Audience Limits

34. As observed above, we continue to support the underlying conclusions contained in the *Report and Order.* In this regard, we believe that any modification to the 12 station rule must be consistent with the policy rationales found in our previous decision.

35. Balancing the benefits of increased group ownership against our traditional policy concerns with respect to diversity and economic concentration, we found in the *Report and Order* that relaxation of the seven station rule was consistent with the public interest goal of providing maximum service to the public.[39] In reaching that decision, we recognized the need to proceed cautiously in order to avoid rapid and immediate restructuring of the broadcasting industry.[40] Reflected in our decision to

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determination regarding the need to curb the dominance or alleged dominance of any specific industry participant. As a consequence, the rationale for the retention of a national ownership rule does not support the imposition of selective and more onerous restrictions on the networks. To the extent that it may be appropriate for the Commission to address such matters, they are better considered in proceedings specifically designed to do so.

[39] The Commission has long recognized that a nationwide system of broadcasting requires that some multiple ownership be permitted. The relevant issue is to determine whether the "greater good which will flow from the proposed rule offsets the disadvantages resulting from permitting individual licensees to own a larger number of stations." *See* n. 14, *supra.* In this regard, the courts have recognized the Commission's authority to promulgate multiple ownership regulations. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956).

[40] *Report and Order* at para. 110.

adopt a transitional rule was the awareness that for many years the seven station rule served as the centerpiece in our regulatory scheme. Since its infancy, broadcasting has operated under some form of national ownership restriction. In this regard, the seven station rule has played a fundamental and vital role in creating the industrial infrastructure of broadcasting by affecting basic economic decisions relating to the development of the medium. Furthermore, our decision to retain an interim ownership limit reflected the very real concern that it would be extremely disruptive to both the industry and the public should we find it necessary, at some later date, to modify our decision and attempt to return to a stricter multiple ownership limitation. In light of these considerations, we found that the interim twelve station rule would allow us to obtain the benefits of group ownership while minimizing the risks to our traditional policy objectives.

36. On reconsideration, we have become increasingly aware of the limitations of proceeding solely with a numerical multiple ownership limit in the event that there is rapid expansion of group ownership in the wake of our relaxing of the national multiple ownership rules. As various parties have argued throughout this proceeding, a numerical approach may not give appropriate consideration to wide discrepancies in population coverage because a station in the largest market is deemed equivalent to a station in the smallest market for purposes of ownership regulation. As a consequence, relaxing the numerical cap from seven stations to twelve stations may provide an opportunity for a single group owner to increase its audience base substantially, particularly if acquisitions are made in the largest markets. A numerical cap does not affect this type of restructuring. While there is no evidence in the record that would lead us to believe that such an eventuality would necessarily have an adverse result, we now believe that the potential for this type of restructuring warrants a more cautious approach. To this extent, we now believe it advisable to adopt an additional ownership limit based on audience reach.

37. We do not believe, however, that we should replace the numerical cap with one based solely on audience reach. Standing alone an audience reach limit may not prevent the acquisition of a tremendous number of stations in the smaller markets. In this respect, retention of a numerical limit may be appropriate, consistent with our desire not to sunset these rules, in order to reduce the possibility of disruptive restructuring in small markets where opportunities for new entrants principally exist. We also recognize that the audience reach is an untested regulatory mechanism as applied to multiple ownership regulation. Retaining the numerical limit will provide us with an opportunity to gain experience with this type of regulation without risking an entire regulatory system should we find

that the audience reach approach proves unworkable.[41] Consistent with our desire to proceed cautiously, we now believe it appropriate to modify our decision contained in the *Report and Order* and adopt, in addition to a numerical cap, a limit on multiple ownership based on audience reach.

38. On reconsideration, we continue to believe that the 12 station limit reflects a reasonable balancing among a number of factors including our concern over potential adverse restructuring of the industry and our desire to capture the benefits of increased group ownership.[42] Accordingly, we retain the 12 station limit established in the *Report and Order.*[43]

39. The parties in this proceeding have presented several proposals relative to the appropriate audience reach limitation for purposes of national multiple ownership regulation.[44] In addition, the record contains two Congressional proposals which would establish an audience reach limit.[45] After reviewing the record in this proceeding, we believe that the

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[41] Indeed, the concept of a multiple ownership rule based on population coverage was proposed at the time the seven station rule was adopted, but was rejected as being unworkable. *See Report and Order* in Docket No. 8967, 18 FCC 288, 292 (1953). To the extent the practicality of this approach has not been proved, we believe that "a month of experience will be worth a year of hearings." *American Airlines Inc. v. CAB,* 359 F.2d 624, 633 (D.C. Cir.), *cert. denied,* 385 U.S. 843 (1966). In this regard, we agree that "perfection is attained by slow degrees; it requires the hand of time." *National Association of Regulatory Utility Commissioners v. FCC,* No. 83-1225, slip op. at 110 (D.C. Cir. June 12, 1984), *quoting Report and Order* in CC Docket No. 78-72, 93 FCC 2d 241, 364 (1983) (Statement of Commissioner James Quello, *quoting* Voltaire).

[42] In this regard, we also note that the 12 station limit represents a cautious reflection of the growth in television stations since the seven station rule was first adopted. *See Report and Order* at para. 111. In addition, Group W, Cox and NBC all proposed retention of a twelve station limit in combination with an audience reach limit. The record also contains two Congressional proposals which support a numerical limit. *See* S. 2962, 98th Cong., 2d Sess. (1984); H.R. 6134, 98th Cong., 2d Sess. (1984).

[43] In its *Petition for Reconsideration,* Hubbard requests an exemption for broadcast facilities operating primarily as terrestrial satellite television stations from any numerical ownership limitation. Hubbard notes that because satellite facilities primarily rebroadcast the programming of parent stations rather than originate programming, they are now exempt from the restrictions concerning Grade B overlap contained in Section 73.636(a)(1) [now Section 73.3555(a)] of our rules. We are persuaded that these facilities should be exempt from the multiple ownership limitations as amended herein.

[44] Proposals for the basic audience reach limitation filed by the parties in this proceeding are as follows: (1) Metromedia (25 percent reach cap for VHF stations with a total reach of 35 percent combined cap for VHF and UHF stations. Also included was a 50 percent discount for independent stations); (2) Group W (27.5 percent reach cap for VHF stations with a 30 percent total reach cap for both VHF and UHF stations); (3) Taft (25 percent reach cap for VHF stations); (4) Cox (27.5 percent reach limit for VHF stations and 30 percent combined reach for VHF and UHF stations); (5) Capital Cities (27.5 percent reach cap for VHF stations and 30 percent reach cap for combined VHF and UHF stations); and (6) INTV (25 percent reach cap for VHF stations with various options).

[45] The proposed Senate bill would establish an audience reach limit of 22.5 percent for all VHF holdings and an aggregate limit of 27.5 percent for combined VHF and UHF

maximum audience reach allowable for the purpose of our rules should be an amount no greater than 25 percent of the national audience as calculated as a percentage of all Arbitron ADI television households.[46]

40. We recognize, of course, that the selection of any particular reach number necessarily involves some measure of administrative subjectivity. We believe, however, that the 25 percent reach cap adopted herein is a reasonable limit given our traditional policy concerns and in light of our expectations as to the potential economic response of the industry once the current seven station limit is relaxed.[47] We also find ample support in the record for adopting a 25 percent audience reach limit.[48] In this regard, not only does the 25 percent cap offer administrative simplicity, but it also represents a more cautious approach when compared with other proposals found in the record. Moreover, an audience limit based on 25 percent of the national audience has historically been considered an appropriate benchmark for the purposes of national multiple ownership regulation.[49] In addition, the 25 percent limit will temper dramatic changes in the ownership structure by the largest group owners in the largest markets.[50] Alternatively, the smaller multiple owners would be given a greater opportunity to expand.[51] Accordingly, we believe it is appropriate to adopt

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holdings. The proposed House bill would create an audience reach cap of 25 percent for VHF owned stations and an aggregate 30 percent reach limit for combined VHF and UHF ownership. *See* S. 2962 and H.R. 6134, n.42, *supra.*

[46] In this regard we note that the Commission has previously relied on Arbitron ADI market data in administering its rules. *See, e.g., Cable Television Report and Order,* 36 FCC 2d 143 (1972), App. A (significantly viewed stations); 47 C.F.R. §73.658(k) note 1 (market rankings for Prime Time Access Rule).

[47] *See Office of Communications of the United Church of Christ v. FCC,* 707 F.2d 1413, 1437 (D.C. Cir. 1982); *NAACP v. FCC,* 682 F.2d 993, 1001 (D.C. Cir. 1982) (predictive judgments of market developments are within the institutional competence of the Commission).

[48] *See* n.44 and 45, *supra.*

[49] *See* S. 1333, 80th Cong., 1st Sess. (1947); *To Amend the Communications Act of 1934: Hearings Before the Subcomm. on Interstate and Foreign Commerce on S. 1333,* 80th Cong., 1st Sess. (1947); S. 3859, 84th Cong., 2d Sess. (1956); *Network Monopoly: A Report for the Comm. on Interstate and Foreign Commerce,* 84 Cong., 2d Sess. (1956); *But see Network Broadcasting: Report of the Comm. on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. (1958) (*Barrow Report*).

[50] In this regard, the 10 largest group owners in terms of Arbitron ADI audience reach are as follows: Metromedia (23.89 percent); ABC (20.76 percent); CBS (20.59 percent); NBC (19.79 percent); WOMETCO/KKR (16.9 percent); Tribune (14.51 percent); RKO (13.5 percent); Chris Craft (11.1 percent); Westinghouse (10.12 percent); and Cox (9.68 percent). *See generally Television and Radio Age,* October 1, 1984 at 83-86.

[51] By way of example, Taft Broadcasting Corporation currently owns seven television stations and cannot expand under the current seven station rule. Pursuant to the general rules adopted herein, Taft would be able to acquire five additional television stations, provided that the stations were purchased in markets whose combined audience did not exceed the 25 percent limit established herein. We note, however, that the audience reach

an audience reach limit of 25 percent of the national television audience as determined by ADI market rankings.[52]

41. In addition to proposing the adoption of an audience reach limit, several petitioners and responding parties request that we give special consideration to UHF stations by manipulating the audience reach limit.[53] We now turn to a discussion of the issues pertaining to special treatment for UHF television.

(a) UHF Discount

42. In the *Report and Order*, we made no distinction between UHF and VHF television stations for purposes of the interim 12 station rule. To the extent that the Commission has long recognized the need for a UHF/VHF distinction in its multiple ownership rules, we agree with those petitioners who have asked us to reconsider this aspect of our *Report and Order*. Reconsideration is particularly appropriate given our heightened concern with the possibility of adverse restructuring of the industry. In this regard, we note that the UHF incentives in our multiple ownership rules have become an integral part of our regulatory framework.

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calculations for Taft would necessarily involve consideration of the UHF discount. *See* n.56, *infra*.

[52] The audience reach of entities having an ownership interest in a commercial television station will be calculated by attributing to the owner the percentage of total ADI households found in each ADI market in which the owner has a commercial television station. Initial determinations as to a group owner's total audience reach will be calculated on the effective date of this order by utilizing the latest Arbitron Market Index Guide. The total audience reach of each group owner will be recalculated upon each future acquisition.

The Commission will not approve any acquisition if at the time that we consider the acquisition the owner already exceeds the limits established herein or will, as a result of the acquisition, exceed the audience reach limit. We will not, however, require divestiture once an acquisition has been approved. For example, a group owner that currently reaches 25 percent of the national audience may exceed this limit at some future time because of population shifts within the ADI markets. While such an occurrence would prevent the group owner from acquiring new stations, it would not be required to divest any of its stations in order to comply with the 25 percent limit. Alternatively, group owners in markets with declining populations may, at some future time, be in a position to acquire additional television stations while remaining at or below the 25 percent audience reach limit.

We recognize that the Arbitron ADI system does not at this time provide television market data for all geographic areas, including Alaska, Hawaii, Puerto Rico and other areas in the United States. An applicant for a station in an area for which Arbitron data are not available will make a showing as to audience reach of its market. The Commission shall then make a determination as to the applicant's audience reach consistent with the policy objectives contained in this *Memorandum Opinion and Order*.

[53] *See* n.44, *supra*.

43. On reconsideration, we find that while there has been demonstrable progress in the viability of UHF television, the inherent physical limitations of this medium should be reflected in our national multiple ownership rules. In this regard, we agree with the UHF Comparability Task Force which found that:

> Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength.[54]

Because the fundamental limitation of UHF television involves its ability physically to reach viewers, we believe the audience reach limit adopted herein is the more appropriate vehicle for expressing our continued concern with this medium. Indeed, each of the petitioners addressing this issue requested that any UHF distinction be reflected by increasing the audience reach limit.[55]

44. While we agree with the petitioners' assessment as to the need for a UHF incentive within the context of the audience reach limit, we do not believe that the incentive should be structured so as to merely increase the reach cap. Such an approach would not accurately represent the physical handicaps confronting UHF television. Consistent with the diversity objectives expressed in our ownership rules, we believe that a more appropriate indicator of the reach handicap of UHF stations is one that measures the actual coverage limitation inherent in the UHF signal. Therefore, with respect to the audience reach limit adopted herein, we believe that owners of UHF stations should be attributed with only 50 percent of an ADI market's theoretical audience reach to account for this disparity. For example, the theoretical ADI audience reach of the New York market comprises 7.72 percent of all television households. Under the system adopted today, the owner of a UHF station in the New York market would be attributed with an audience reach of only 50 percent of this amount which equals 3.86 percentage points.[56] We find that the

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[54] *Comparability for UHF Television: Final Report,* September 1980 at 2. *See Report and Order* in Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982).

[55] None of the petitions for reconsideration request that a UHF/VHF distinction be made with respect to the numerical cap. *See* n.42 and 44, *supra.* To the extent that the original UHF exemption to the five station rule was granted to promote the development of a new medium, we believe that continuation of the dichotomy with respect to the 12 station cap is no longer appropriate. In the context of this proceeding, retention of the UHF/VHF distinction with respect to the audience reach limit is primarily a reflection of the physical reach limitations of UHF service as compared with VHF television. We also note that the discount system will reduce the possibility of erosion of the tremendous progress made by UHF television to date.

[56] Using the example cited above (*see* n.51, *supra*), Taft currently owns two UHF stations whose audience reach equals 4.72 percent of the national audience. Under the discount

discount system adopted herein properly reflects the Commission's historical concern with UHF television. Furthermore, the discount approach provides a measure of the actual voice handicap and is therefore consistent with our traditional diversity objectives.

(b) Minority Incentives

45. In the *Report and Order,* we observed that the national multiple ownership rules were not primarily intended to function as a vehicle for promoting minority ownership in broadcasting. In this regard, we noted that the Commission has instituted various policies such as tax certificates, distress sale benefits and lottery preferences to promote minority ownership in communications.[57] We continue to believe that these policies, as opposed to our multiple ownership rules, should serve as the primary mechanisms to promote minority ownership in television and radio broadcasting. We recognize, however, that our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership. Thus, while it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership, we now believe that a minority incentive should be included in the rules adopted by our action today. Accordingly, we are adopting rules today which permit group owners of television and radio stations to utilize a maximum numerical cap of 14 stations provided that at least two of the stations in which they hold cognizable interests are minority controlled. Group owners having a cognizable interest in at least one minority controlled television or radio station may utilize a maximum numerical cap of 13 stations. Extending this policy to the audience reach limit for television, we believe that a group owner having cognizable interests in minority controlled television stations should be allowed to reach a maximum of 30 percent of the national audience, provided that at least five percent of the aggregate reach of its stations is contributed by

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approach, only 50 percent of this amount, 2.36 percentage points, would be attributed to Taft for the purpose of calculating its total audience reach limit. As a result, Taft's current portfolio would amount to 6.71 percent of the national audience as opposed to 9.07 percent in the absence of the discount. Applying the discount to its present station portfolio would allow Taft to increase its combined audience reach by at least 18.29 percentage points if it acquires all VHF stations. We also note that the UHF discount applies to future acquisitions. As a consequence, if Taft chooses to acquire additional UHF stations, its growth potential is correspondingly increased.

[57] *See Policy Statement and Notice of Proposed Rulemaking* in Gen. Docket No. 82-797, 92 FCC 2d 849 (1982); *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979 (1978); *Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications Strategies for Advancing Minority Ownership in Telecommunications* (May 1982).

minority controlled stations.[58]

46. A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies.[59] In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein.[60]

2. Radio

47. On reconsideration, we continue to believe that our decision in the *Report and Order* as applied to radio was correct.[61] Only NBMC requests review of our decision, arguing that the Commission should eliminate the distinction between AM and FM and set a numerical limit at 14 stations per owner. Referencing its reply comments, petitioner claims that the AM/FM distinction "probably" encourages co-ownership of AM and FM station in the same local market. NBMC argues further that eliminating the AM/FM distinction will increase local diversity by eliminating incentives for creating local combinations.[62] The petitioner presents no evidence to support its contention that the distinction between AM and FM in our ownership rules actually encourages local co-ownership of radio stations. Moreover, we note that it is our local rules that play the most significant role in permitting AM/FM combinations. In this regard, we do

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[58] We believe that the five percentage point increase is an appropriate incentive to encourage minority ownership in television broadcasting and note that it has been suggested elsewhere as well. *See* H.R. 6134, 98th Cong., 2d Sess. (1984). *See also* S. 2962, 98th Cong., 2d Sess. (1984). It should be noted that the minority incentive adopted herein will be applied to a group owner's aggregate audience reach, the calculation of which would already include the effects of any UHF discounts.

[59] *See Policy Statement and Notice of Proposed Rulemaking* in Gen. Docket 82-792, n.57, *supra*, at para. 16.

[60] The Commission has instructed the staff to prepare for its early consideration a *Notice of Proposed Rule Making* which examines the interaction between the minority incentives adopted by this *Order* and the broadcast ownership attribution rules. In particular, under the single majority shareholder rule, a 49 percent stockholder of a broadcast license is not attributed with that interest under our multiple ownership rules if a majority of the licensee's stock is held by a single majority shareholder. *See* 47 C.F.R. §73.3555 NOTE 2(b). The proposed *Notice of Proposed Rule Making* will explore this aspect of the attribution rule in light of the minority incentive adopted herein.

[61] We note, of course, that the *Order* which stayed the effective date of the *Report and Order* did not apply to radio broadcasting. *See* n.5, *supra*.

[62] In this regard, we note that if a non-licensee files a mutually exclusive application for either the AM or FM station, it would receive an advantage for diversification under the Commission's standard comparative criteria. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

not deem it advisable to reevaluate our previous decisions with respect to our local rules on the record now before us.[63] We recognize that growth of FM service has made it a viable competitor in the marketplace. We do not believe it appropriate at this time, however, to eliminate the AM/FM distinction as contained in our national multiple ownership rules, particularly in light of our recent decision with respect to new FM allocations.[64] Finally, we note that limiting the total number of AM and FM radio stations that may be owned by a single entity to 14 amounts to a de facto return to the seven station rule with respect to aggregate number of radio stations that may be owned by a single entity. Even assuming, *arguendo*, that elimination of the AM/FM distinction would provide radio broadcasters with greater choice in their broadcast acquisitions, there is no evidence in the record to support a return to a maximum 14 station limit.[65] In this regard, we believe a more appropriate approach would be to retain the regulatory distinction between AM and FM at this time.[66]

48. NBMC has also requested that we eliminate the sunset provision as applied to radio. Consistent with our discussion, *infra*, we believe that the 12 station limit for radio should not terminate automatically in six years.

3. Elimination of Automatic Sunset

49. The *Report and Order*, established a six year transition period for the 12 station numerical limit for both radio and television. On reconsideration, we find it inadvisable to terminate the ownership regulations adopted herein automatically at the end of six years. We continue to believe that it is appropriate to proceed cautiously in relaxing rules that affect such a vital aspect of the broadcasting industry. Virtually all parties on reconsideration agreed that the automatic termination of the multiple ownership rule is not an integral part of relaxing the seven

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[63] *See Memorandum Opinion and Order* in RM 3401, FCC 82-113, 51 R.R. 2d 449 (1982); *Second Report and Order*, 50 FCC 2d 1046 (1975).

[64] *See Report and Order* in BC Docket 80-90, 53 R.R. 2d 1550 (1983).

[65] *See Report and Order* at para. 34.

[66] In this regard we note that there is now before the Commission a Petition for Rule Making (RM-3567), filed by Hyman Goldin on October 22, 1979. To the extent that petitioner requests us to examine the multiple ownership rules as applied to radio broadcasting, his request has already been accomodated with the subsequent adoption of the *Notice* in the instant proceeding. The petitioner, however, also urges that Commission amend its rules by restricting combined AM/FM ownership to a maximum of 7 stations. As noted above, the record in this proceeding supports a relaxation of the multiple ownership rules for radio rather than the imposition of more restrictive regulations. Therefore, to the extent the petitioner urges us to adopt a specific numerical cap for radio broadcasting, we believe that the Petition for Rule Making should be denied.

station rule. We agree and find that an automatic sunset of our ownership rules is unnecessary to achieve our policy objectives.

CONCLUSION

50. On reconsideration, we affirm the conclusion contained in the *Report and Order* that, as a policy matter, the total elimination of a presumptive national ownership rule would benefit the public interest. We are convinced that the repeal of the seven station rule would not contravene our traditional policy objectives of promoting diversity and preventing undue economic concentration.

51. While we continue to recognize the importance of enhancing diversity, we reject the notion that we must consider diversity to the exclusion of other important considerations in assessing the need to retain a national multiple ownership rule. Rather, in determining the approach which best serves the public interest, our responsibility is to balance considerations of diversity with other important regulatory goals.

52. While repeal of the seven station rule is warranted as a matter of policy, we recognize that the rule has been an integral part of our regulatory framework for many years. In this regard, our objective is to permit a reasonable amount of expansion of group ownership immediately but not to create the danger of an abrupt and disruptive restructure of the national broadcasting industry. To achieve this objective, we reaffirm our decision to relax the numerical cap to permit the ownership of 12 AM, 12 FM and 12 TV stations by a single person and in addition establish an audience reach cap which would limit the aggregate ownership interests in TV stations to those which penetrate a maximum of 25 percent of the national audience as measured by Arbitron ADI market rankings. Moreover, due to the physical limitations of UHF signals, we will attribute owners of UHF stations with only 50 percent of their theoretical ADI reach. Broadcast facilities operating primarily as terrestrial satellite television stations will be exempt from both the numerical and audience reach limits adopted herein.

53. While our multiple ownership rules are not the primary vehicle by which we effectuate our policy to promote minority participation in the broadcast industry, we believe it appropriate to take cognizance of this policy by adopting rules which encourage minority ownership. Accordingly, we will increase to 14 the numerical station ownership limitation for persons acquiring cognizable interests in such minority owned and controlled broadcast stations. With respect to the audience reach limit for television, a station owner will be allowed to reach a maximum of 30 percent of the national audience, provided that at least 5 percent of the aggregate reach of its stations is contributed by minority controlled stations. For the purposes of the rules adopted herein, minority control shall be defined as a station having greater than a 50 percent minority

ownership. Finally, on reconsideration, we have decided that it is inappropriate for us to eliminate the national multiple ownership rules automatically after a fixed six year period.

IMPLEMENTATION

54. Because the Congressional moratorium does not apply to the radio aspect of our *Report and Order,* the rules adopted herein as they affect radio broadcasting will become effective 30 days after publication of this *Memorandum Opinion and Order* in the Federal Register. As applied to television the rules adopted herein shall become effective April 2, 1985.[67]

REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of the Rule

55. While we continue to believe that, as a policy matter, there is no need for national multiple ownership regulations in order to promote our traditional policy objectives, we have retained the above stated ownership rules in order to avoid potential adverse restructuring of the industry.[68] In this regard, our objective is to permit reasonable expansion so as to capture the benefits of group ownership while avoiding the possibility of potential disruptive restructuring of the national broadcast industry.

II. Summary of Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis

56. As observed in the regulatory flexibility analysis for the *Report and Order,* a relaxation of the seven station rule would have no adverse effect on small business. Moreover, the combined numerical and audience reach caps adopted for television will minimize the potential for harmful restructuring that could possibly have accompanied a immediate repeal of the rule. In addition, the minority incentives adopted herein will assist small minority businesses. The UHF discount may also provide greater investment into UHF stations that often are smaller enterprises.

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[67] The Congressional moratorium prevented implementation of the television aspects of the *Report and Order* prior to April 1, 1985 or 60 days after reconsideration, whichever is later. The date of the adoption of this *Memorandum Opinion and Order* is December 19, 1984, thereby making April 2, 1985 the later of the two dates. In addition, Section 553(d) of the Administrative Procedure Act requires publication of a substantive rule to be not less than 30 days before its effective date. 5 U.S.C. §553(d) (1982). The April 2, 1985 implementation date we adopt herein is in conformance with the procedural requirements of this statute.

[68] We note that a final Regulatory Flexibility Analysis was inadvertently omitted from the *Report and Order.* A final Regulatory Flexibility Analysis for the *Report and Order* appears in Appendix B.

III. Significant Alternatives Considered and Rejected

57. Issues concerning the various policy options were addressed sufficiently in the Regulatory Flexibility Analysis for the *Report and Order.* We believe that the more cautious approach adopted herein will reduce the potential for adverse restructuring of broadcast industry. Similarly, the cautious approach adopted herein will also reduce the potential for adverse effects with respect to small businesses.

58. Accordingly, IT IS ORDERED, That the petitions for reconsideration filed in this proceeding ARE GRANTED to the extent indicated herein, and in all other respects, ARE DENIED.

59. IT IS FURTHER ORDERED, That Part 73 of the Commission's Rules and Regulations IS AMENDED, as set forth in Appendix A. The rules adopted herein for radio broadcasting shall become effective 30 days after publication of this *Memorandum Opinion and Order* in the Federal Register. The rules adopted herein for television broadcasting shall become effective April 2, 1985.

60. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Hyman Goldin (RM-3567) IS HEREBY DENIED.

61. IT IS FURTHER ORDERED, That FCC Forms 301, 314 and 315 WILL BE AMENDED by separate Commission action in accordance with the provisions of this *Memorandum Opinion and Order.*

62. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE a copy of this *Memorandum Opinion and Order* to be printed in the FCC Reports.

63. Authority for the actions taken herein is contained in Sections 4(i) and (j), 301, 303, 308, 309 and 405 of the Communications Act of 1934, as amended.

64. For further information concerning this proceeding, contact David L. Donovan or Laurel R. Bergold, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. In Subpart H, Section 73.3555, paragraph (d) is amended to read as follows:

(d)(1) No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(A) more than fourteen (14) stations in the same service, or

(B) more than twelve (12) stations in the same service which are not minority-controlled.

(2) No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(A) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or

(B) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

(3) For purposes of subsection (d) of this section:

(A) "national audience reach" means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI data at the time of a grant, transfer or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their ADI market. Where the relevant application forms require a showing with respect to audience reach and the application relates to an area were Arbitron ADI market data are unavailable, then the applicant shall make a showing as to the number of television households in its market. Upon such a showing, the Commission shall make a determination as to the appropriate audience reach to be attributed to the applicant.

(B) "TV broadcast station" or "TV station" exclude stations which are primarily satellite operations.

(C) "minority-controlled" means more than 50 percent owned by one or more members of a minority group.

(D) "minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

2. In Subpart H, Section 73.4285 is deleted.

Appendix B

REGULATORY FLEXIBILITY ANALYSIS FOR THE *REPORT AND ORDER* ADOPTED JULY 26, 1984.

I. *Need for and Purpose of Rule*

1. The purpose of the Commission's national multiple ownership limitations has been to promote diversity of program service and prevent undue economic concentration in broadcasting. After reviewing an extensive record in this proceeding, we conclude that these regulatory constraints are no longer necessary to accomplish these goals. We find that the appropriate geographic market for diversity analysis is primarily local and our local multiple ownership rules, which are unaffected by the *Report and Order*, are the rules which are designed to promote diversity in that geographic market. We also find that the relevant product market, the information services market, has undergone expotential growth since the adoption of the seven station rule; it includes both a large number and broad variety of mass communications sources. Thus, even assuming that the information services market is a national one, it is sufficiently diverse so as to be unaffected by the transitional relaxation and subsequent elimination of the seven station rule prescribed by the *Report and Order*. Moreover, we note that there are diversity benefits to group ownership through the production of quality public

affairs programming and new programming. Furthermore, the record establishes that there is no danger of excessive economic concentration in the relevant competitive markets and that there are potential efficiency gains from repeal of the rule. We also find that repeal of the rule will adversely affect minorities and that there are other more appropriate vehicles for achieving the Commission's objectives with respect to minority ownership.

2. We conclude that the seven station rule is no longer necessary to promote our traditional policy concerns of viewpoint diversity and economic competition. We note, however, that if the rule were repealed immediately and in its entirety a significant restructuring of the broadcast industry may occur. While the record contains no evidence of potential harm from the ownership changes that would be made possible by immediate repeal of the rule, out of an abundance of caution, we will establish a transitional limitation for a period of six years during which multiple station ownership in each broadcast service will be capped at a numerical limit.

II. *Summary of Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis, Commission Assessment and Changes Made as a Result*

3. In the *Notice* we stated that modifying the seven station rule would have a direct and immediate impact upon only a limited number of entities, because few station owners are at or near the "seven station" limits. Nothing in the record causes us to alter this observation and consequently we continue to believe that the immediate and direct effect of a relaxation of the seven station rule would not be significant with respect to the majority of broadcasters.

4. We also stated in our *Initial Regulatory Flexibility Analysis* that over a period of time, those entities that have not yet reached the seven station limit could be expected to increase their station portfolios. As a result, we noted that a relaxation of the seven station rule may facilitate the ability of small businesses to obtain new capital from investors desiring equity participation in broadcasting. The evidence contained in the record in this proceeding supports this observation.

5. In our initial analysis, we observed that relaxation of the seven station rule may allow small entities to enter into program production and related areas through the realization of efficiencies found in larger enterprises. Evidence contained in the record supports our analysis that relaxing the seven station rule may provide these entities with a sufficient audience base where they may be able to commence program production by themselves or in conjunction with other group owners. With respect to increased efficiencies, the record contains evidence supporting the proposition that group ownership can foster greater efficiencies with respect to news gathering, editorializing and public affairs programming, and the development of independent programming by regional or ad hoc networks. We note, however, that while these and other efficiencies are probable, it is difficult to assess how significant they might be in light of the constraints imposed by the current regulatory ceilings. In this regard, the ability to utilize previously untapped efficiencies of group ownership may be reflected in station prices. If this were the case, station prices could rise because efficiencies would increase their value to group buyers. There is no hard evidence in the record, however, that station prices are likely to rise significantly. The theory that greater efficiencies of size may exist at some level above seven stations is consistent with the position of those commenters who argued that larger group owners could more easily form ad hoc networks.

6. In reaching our decision, we also analyzed the potential anticompetitive effects that could possibly accompany a modification of the seven station rule. Regarding the possibility of a competitive harm, we adopt the conclusion of the Department of Justice, the agency entrusted with the enforcement of the antitrust laws, that elimination of the seven station rule will have little adverse competitive effects in any market, and that license transfers involve no significant competitive risk simply because they result in common ownership of

more than seven stations in a broadcast service. Specifically, we note that elimination of the rule will not adversely affect local spot advertisers, national advertisers or independent program producers.

7. Our initial analysis noted the potential impact on other small entities such as station brokers, those involved in financing broadcast stations and suppliers to broadcasters. Nothing in the record controverts our initial analysis that the turnover of stations and new station start-ups may create new or additional business for these entities. On the contrary, there is evidence in the record indicating that relaxing the rule of sevens may lead to increased equity investment in broadcasting.

8. In summary, the evidence contained in the record supports the conclusion that the rule of sevens should, after a transitional period, be completely eliminated. Specifically, there is no persuasive evidence to indicate that small businesses, as a class, would be affected adversely by a transitional relaxation and subsequent elimination of the seven station rule. On the contrary there is every reason to believe that the modification of the seven station rule adopted by the *Report and Order* would have a positive effect on small business organizations.

III. *Significant Alternatives Considered and Rejected*

9. The *Notice* in this proceeding proposed a consideration of a wide variety of regulatory options ranging from complete elimination of all national multiple ownership regulations to relaxing the seven station limit. Evidence in the record supports a complete elimination of the national multiple ownership rules for both radio and television. To the extent that a repeal of all national multiple ownership rules would have no adverse competitive impacts, we believe that relaxing the multiple ownership rules at some level short of total repeal will likewise have no adverse competitive consequences. In addition, there is no persuasive evidence in the record justifying differential treatment of the networks for the purpose of national multiple ownership restrictions. In this regard, the record does not demonstrate that small business will be uniquely disadvantaged by either a total repeal of the national multiple ownership rules or by a relaxing of the seven station rule.

10. As observed above, we have retained an interim 12 station ownership limit. In this regard, any potential adverse affect on small businesses that could possibly accompany an immediate repeal of all multiple ownership rules will be minimized. We note, however, that the record contains no persuasive evidence of any potential harm to small businesses from complete repeal of the rule.[1]

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON CONCURRING IN PART

In my dissent to the Commission's original decision in this proceeding, I proposed a relatively simple plan for replacing the Commission's seven-station rule with a rule based on a percentage cap of the national television audience. *Amendment of Section 73.3555 of the Commission's Rules, 100* F.C.C.2d ___ (1984) (Dawson, C., dissenting). I believed that a

[1] The above Regulatory Flexibility Analysis applies to the *Report and Order* in this proceeding which was adopted by the Commission on July 26, 1984. The Regulatory Flexibility Analysis for the *Memorandum Opinion and Order* appears in paragraphs 55 to 57 of the main text.

percentage cap was a sound approach which would have withstood both legal and legislative muster.

The instant decision adopts such a percentage cap, which I support enthusiastically. However, this decision also includes aspects which I support much less enthusiastically. For example, it not only retains a 12-station cap for radio but also deletes the six-year sunset for the radio cap adopted in the original order. Likewise, this decision retains a 12-station limitation on television ownership even though I continue to believe that a numerical cap handicaps virtually all non-network group owners in their ability to compete with the established networks since those group owners will almost certainly reach the numerical cap long before they reach the percentage cap.

Perhaps most unfortunately, this decision adopts separate caps for minority ownership, and I can only concur in the adoption of these provisions. I do not believe that the Commission's national ownership rules are the proper vehicle to provide incentives for minority ownership. If the Commission's concern is the concentration on a nationwide basis of too much ownership in any one entity's hands, I do not see how that concentration is in any way ameliorated by the race of that entity's owners.

SEPARATE STATEMENT OF COMMISSIONER DENNIS R. PATRICK DISSENTING IN PART

For the most part, I support this item. On reconsideration, the overwhelming weight of the comments suggested that the Commission adopt an even more cautious approach to relaxation of our multiple ownership rules than that in our initial decision. The Commission has, in my opinion, made an appropriate adjustment to reflect those concerns.

I dissent in part, however, to that portion of the decision that sets two different national ownership rules based on race, for the reasons set forth below.

I am a strong supporter of our efforts to foster minority ownership. I believe that our comparative hearing process, in which we use criteria recognizing the important contribution which minority ownership and integration into management can make to diversity in the marketplace of ideas, is a positive model in this regard.

I am unsure, however, that the national ownership rules are the proper vehicle to attempt to structure incentives for minority ownership. Our national ownership rules are concerned with ensuring that no single individual controls access to too large a segment of the American public. Surely this is not an issue that turns on race. If the public interest is

threatened by concentrating ownership of 14 stations in a single owner, how is that threat obviated by the race of that owner?

Our minority ownership policies, on the other hand, are designed to maximize diversity among broadcast licensees — but subject to the same national ceiling. I believe, therefore, that we should set a single national ownership ceiling and then work, within the constraints of that limit, to foster minority ownership of broadcast stations.

I note, in this regard, that the Commission concluded in our initial decision in this matter that the national multiple ownership rules were an improper vehicle to promote minority ownership. I find little in the majority's decision or in the record to support a reversal of this position.

Even assuming that our national ownership rules should be used to facilitate minority ownership, however, I must still dissent in part to the majority's plan. I believe that this Commission, like any other government body, should use racial classifications in granting or denying civil rights only in a manner which bears a direct and necessary relationship to the interest at issue— here, promoting diversity of viewpoints. Under the majority's plan, the nexus between the use of racial classifications and the promotion of diversity interests is too tenuous.

Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given as to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all.

I believe that this Commission would be better advised to proceed on a case-by-case waiver basis. For example, the Commission might grant waivers of its 12 station/25% reach ownership ceiling, to a maximum of a 14 station/30% reach limit, upon a showing by an applicant that the acquisition would contribute to diversity. In evaluating such applications the Commission could evaluate numerous factors in addition to race, just as we do in the comparative process — including such factors as integration of the minority owners into management or their participation in other influential roles (e.g., sitting on the board of directors), the filling of other key managerial positions with minority employees, proposed programming, involvement in local minority organizations, etc. In addition, we could focus on the amount of minority ownership, thereby avoiding a rigid requirement of 51% which may well render the majority's plan ineffectual in practice.

Such a process would allow the Commission to focus on whether our compelling interest in promoting diversity of viewpoints is furthered. And it would avoid the Commission's granting of preferences based solely on race without regard to whether diversity will be furthered.

Under its present form, however, I cannot vote for the Commission's plan. Accordingly, I dissent in part.

Antenna Farm
Minimum Mileage Separation
Short Spacings

Relocation of facilities to a *de facto* antenna farm is one public interest factor which justifies waiver of the minimum mileage separation rule (Section 73.207) where a suitable non-short-spaced (or less short-spaced) site is unavailable and a licensee's city-grade coverage is deficient.
—*Beasley B/cing of Phila., Inc.*

FCC 85-79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Beasley Broadcasting of Philadelphia, Inc. (WXTU) Philadelphia, Pennsylvania Has: 92.5 MHz, 223; 40 kW(H); 40 kW(V); 168 m Req: 92.5 MHz, 223; 15.7 kW(H); 15.7 kW(V); 274 m For Construction Permit	File No. BPH-831102AI

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1985; Released: February 26, 1985

BY THE COMMISSION:

1. The Commission has before it the above-captioned application to change the transmitter site, effective radiated power and antenna height above average terrain of Station WXTU. In seeking grant of its proposal, Beasley Broadcasting of Philadelphia, Inc., ("BBP") requests a finding that it qualifies under the designated antenna farm exception to our mileage separation criteria, Section 73.209(c) of the Commission's Rules. In the alternative, it requests a waiver of our spacing rule, Section 73.207.

2. BBP seeks authorization to move its antenna to an area known as the Roxboro antenna farm, a site approximately three miles northwest of Norristown, Pennsylvania and approximately eleven miles southwest of its present location. The proposed site would create short-spacings of 1.7 miles to station WKQV, Vineland, New Jersey and 7.6 miles to station WOBM, Toms River, New Jersey.[1] According to BBP, this site change is necessary because of significant deficiencies in the coverage by WXTU of its community of license. BBP's engineering submission shows a serious shortfall in WXTU's city-grade coverage and substantial shadowing of the Philadelphia area. Past efforts to find a suitable non short-spaced site have proven unsuccessful. The applicant now proposes a move to the Roxboro antenna farm, which would improve substantially its 70 dBu coverage of Philadelphia.

3. BBP requests that the subject application be granted under the provisions of Section 73.209(c) of the Rules.[2] Section 17.8 of our Rules provides for the establishment of designated antenna farm areas by rulemaking. To date, however, we have designated no official antenna farm areas. See Section 17.9 of the Rules. Therefore, the provisions of Section 73.209(c) are not available to the applicant. We will, however, consider the proposed antenna location as one of the factors relevant to BBP's alternative request for waiver of the minimum mileage separation requirements under Section 73.207.[3]

4. In 1962, we determined that minimum mileage separation standards embodied in a table of frequency allotments offered the best means for achieving an orderly, efficient and effective development of the commercial FM broadcast service. *First Report and Order in Docket 14185,* 33 FCC 309 (1962). An applicant who requests waiver of our minimum

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[1] Both WOBM and WKQV are class A stations which operate on first and second adjacent channels, respectively. In this situation, the required spacings would be 65 and 40 miles, respectively. A petition to deny the captioned application was filed by the licensee of WKQV, but was withdrawn on July 10, 1984 pursuant to an agreement between the parties.

[2] "When the Commission determines that grant of an application would serve the public interest, convenience, and necessity, and the instrument of authorization specifies an antenna location in a *designated* antenna farm area which results in mileage separations less than those specified in this subpart, FM broadcast permittees and licensees shall be afforded protection from interference equivalent to the protection afforded under the minimum mileage separations specified in this subpart." 47 C.F.R. §73.209(c). [emphasis added].

[3] "Petitions to amend the Table of Assignments (Section 73.202(b)) (other than those expressly requesting amendment of this Section or Section 73.205) will be dismissed and no application for a new station, or change in the channel of an existing station, or change in the location of an existing station, will be accepted for filing, unless the proposed facilities will be located at least as far from the transmitter sites of other cochannel and adjacent-channel stations (both existing and proposed) as the distances in miles specified in this paragraph." 47 C.F.R. §73.207.

mileage separation rules must demonstrate that other suitable sites which are not short-spaced (or less short-spaced) are unavailable. The applicant must also affirmatively demonstrate that grant of the requested waiver would further the public interest. *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976).

5. BBP's engineering data demonstrates that WXTU, from its present Norristown site, provides an adequate city-grade signal to only 48.5% of the community of license and that, because of terrain shielding, only 6.8% of Philadelphia's land area receives line-of-sight service. We have found in the past that improvement in patently inadequate city-grade coverage supports a waiver of the spacing rule. *Greater Media, Inc.*, 37 RR2d 630 (1976).

6. In addition, BBP has demonstrated that it has been unable to find a site for its antenna that would meet our spacing requirements, would provide a 70 dBu signal over its entire city of license, and would be available in light of air-hazard and zoning considerations. BBP, together with the prior licensee of WXTU (who had the same coverage concerns), made eight separate attempts over a twelve year period to improve WXTU's coverage through antenna-site changes. These eight attempts proved unsuccessful. We believe BBP has clearly demonstrated a good faith and protracted effort to secure a site that would meet our mileage separation requirements and at the same time ameliorate its inadequate city-grade coverage.

7. In addition to the public interest benefits inherent in improving coverage to Philadelphia, other public interest factors come into play in our decision. As previously noted, the applicant proposes to move its transmitter site to the "Roxboro antenna farm," a site some 10 miles southeast of the present one and closer to the city of license. The Roxboro site encompasses existing towers on which the antennas of 10 FM facilities and all seven television stations in the Philadelphia market are clustered.[4] Although we have never established a *designated* antenna farm under Part 17 of our Rules, we recognize that *de facto* antenna farm areas such as this one have existed for some time with beneficial effect.

8. In *WTCN Television, Inc.* (*WTCN*), 14 FCC 2d 870, 14 RR 2d 485 (Rev. Bd., 1968), the Review Board was faced with a proposal to move television facilities to a *de facto* antenna farm which would have resulted in subminimal spacing. In that case, the Review Board sanctioned grant of a short spaced proposal by a Minneapolis television station to allow it to relocate its antenna to a *de facto* antenna farm in the Minneapolis-St. Paul area. The Review Board found that beneficial public-service considera-

[4] The Roxboro antenna farm presently comprises twelve towers in a area less than a half mile square, six of which are 1000 feet or higher. There is also an AM three tower directional array at the same location.

tions from location on the antenna farm justified waiver of the spacing rules.

9. As in *WTCN, supra,* the issue before us goes to the question of whether the aggregation of tall broadcast towers in a single site, resulting in upgraded facilities and improved service to the public, weighs against the disadvantages inherent in the creation of short-spacings.

10. We are applying the rationale of the Review Board in *WTCN Television, Inc., supra,* to the case at hand, which presents a similar factual setting in the FM service. The Roxboro farm was created by radio and television licensees on an *ad hoc* basis looking to a mutually advantageous location in which to cluster tall towers to better serve the Philadelphia market. We believe that *de facto* antenna farm areas are within the aims and objectives of our antenna farm policy[5] and find them to be a necessary and constructive accommodation of aviation and broadcasting interests. We find the public-interest benefits arising from WXTU's move to the existing, *de facto* Roxboro farm outweigh any detriment associated with the subminimal spacings to be created.[6]

11. Our holding here should not be construed as sacrificing the integrity of the FM system of allocations to an improvement in broadcast service, or an enhancement of air safety, or both. That BBP has committed itself to provide protection to the short-spaced stations equivalent to that which they would enjoy if full spacing existed, and to resolve any interference problems that in fact arise, ensures no real harm to those stations in the form of newly created interference or diminution of their protected service contours. In the past, we have not deemed the affording of equivalent protection to short-spaced stations enough, by itself, in situations governed by Section 73.207 of the Rules, to justify waiver of our spacing rules. *Florissant Broadcasting Co., Inc.,* 40 RR 2d 428, 430 (1977); *Musicast of the South, Inc.,* 45 RR 2d 1689 (1979). Here, however, we do not rely solely on equivalent protection or any other single factor as justification of the result we have reached. Rather, evaluating all of the factors in play has convinced us that the balance tilts in favor of waiving the separation rules.

12. We find that the applicant is legally, financially, technically, and otherwise qualified to construct and operate as proposed, and we have determined that waiver of our spacing rules and grant of the subject application would serve the public interest, convenience and necessity.

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[5] *Report and Order* in Docket No. 16030, 8 FCC 2d 559, 10 RR 2d 1514 (1967).

[6] Indeed, our recent actions in MM Docket 80-90, cause us to devote more attention to the potential hazards to air safety that the expected growth in the number of tall FM towers may create. In view of that, we intend to consider location on a recognized antenna farm, whether officially designated or not, as a positive factor to be weighed in requests in FM spacing waivers.

Accordingly, IT IS ORDERED That, the above application by Beasley Broadcasting of Philadelphia, Inc., to improve the facilities of WXTU IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Data Transmission
Multi-channel Television Sound
Telecommunications Service for the Deaf
Telecommunications Service-Vertical Blanking Interval
Teletext
Television-Vertical Blanking Interval

Memorandum Opinion and Order adopted addressing cable must carry status for program-related multi-channel television sound (Docket No. 21323), teletext (BC Docket No. 81-741), and telecommunications services on the TV vertical blanking interval (MM Docket No. 84-168). Commission left dockets in these proceedings open to monitor development of program-related ancillary services.
—*Cable TV Systems*
Docket No. 21323

FCC 85-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
The Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters	Docket No. 21323 RM-2836
Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize Transmission of Teletext by TV Stations	BC Docket No. 81-741 RM-3727 RM-3876
Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations.	MM Docket No. 84-168

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1985; Released: February 8, 1985

BY THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN; AND PATRICK ISSUING A SEPARATE STATEMENT.

1. On March 29, 1984, the Commission adopted a *Second Report and Order* in Docket No. 21323, 49 FR 18100. In that decision, the Commission expanded the authority for broadcast television stations to operate subcarrier services on the TV aural baseband. The new rules permit use of aural baseband subcarriers for stereophonic sound, second language audio, and any other broadcast or non-broadcast service. In granting this expanded authority, the Commission determined that aural subcarriers services unrelated to program content are ancillary in nature and do not merit the protective regulation that is accorded to primary television services.

2. With respect to program-related multi-channel television sound (MTS) services such as stereophonic sound and second language programming, the Commission "decline[d] to impose mandatory signal carriage of these aural subcarrier transmissions at this time." *Id* at para. 27. Soon thereafter, on July 26, 1984, we adopted a *Second Further Notice of Proposed Rule Making,* 49 FR 32619, (*Second Further Notice*) to collect for the record additional factual information about program-related MTS services and carriage of these services by cable systems.[1] The Commission sought to determine the answers to questions involving, *inter alia,* MTS receiver penetration projections, consumer demand for MTS, costs associated with retransmission of MTS, the technical problems that arise in cable carriage of MTS, and the need for mandatory carriage obligations in order to assure that these services will be retransmitted on cable systems.

3. Based on the record[2], a majority of Commissioners believe that program-related MTS is a part of the basic signal and is required to be delivered by whatever technical means the cable system chooses, but are not prepared to implement mandatory carriage at the present; while others remain unconvinced that any regulatory intervention is required.

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[1] The Commission also postponed its decision on must carry status for program-related teletext and VBI telecommunications services until its decision on this question for TV aural subcarriers. *See, Memorandum Opinion and Order* in BC Docket 81-741, adopted November 8, 1984, 50 Fed. Reg. 4678 (February 1, 1985); see also *Report and Order* in MM Docket 84-168, adopted November 8, 1984, 50 Fed. Reg. 4658 (February 1, 1985).

[2] For example, the comments of the major television networks indicate that while they are committed to stereo service, there are no plans for major conversion to stereo programming in the near future. Predictions submitted by the Electronics Industries Association, Zenith, and the National Association of Broadcasters indicate that MTS receiver penetration will grow gradually, perhaps reaching 10 percent by mid-1985 and between 18 and 44 percent by 1989. Finally, we note that according to *Broadcast Management/Engineering* magazine (January 1985, p. 59) only eight television stations have actually started stereo broadcasting to date. Information from trade publications also indicates that only a limited amount of stereo-enhanced programming is currently available, most of this in the form of feature films and syndicated music video shows that were not produced specifically for broadcast television.

Accordingly, we will continue to monitor the development of MTS technology, its use, demand, and delivery to the cable consumer. At such time as the Commission chooses to act on the question of mandatory carriage of MTS, we will call for an additional round of comments to develop a timely record to decide the question. Accordingly, Docket No. 21323 will remain open.[3]

4. In order for the Commission to appraise the development of multi-channel sound, the Commission instructs the Mass Media Bureau annually to determine and report to the Commission on the following: (1) the extent to which television broadcasters are transmitting using MTS, (2) the extent to which consumers are purchasing and using television receivers or other devices with MTS reception capabilities, and (3) the extent and manner of cable carriage of broadcast MTS.

5. This order does not impose upon our licensees or the public any reporting requirements. We believe that the Mass Media Bureau will be able to assess the development and use of this technology without such formal reporting requirements. When the Commission decides to revisit this issue, a formal record can be developed to receive information relating to MTS use and development at that time.

6. Accordingly, IT IS ORDERED, that the Mass Media Bureau is instructed to report annually to the Commission consistent with the instructions contained herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF CHAIRMAN MARK S. FOWLER AND COMMISSIONER DENNIS R. PATRICK

Re: Memorandum Opinion and Order in Docket No. 21323

We applaud the restraint of the Commission in declining to impose mandatory carriage of program-related multi-channel television sound (MTS). The annual reports the Mass Media Bureau will prepare will allow us to assess the development of MTS and decide the issue of mandatory carriage at some point in the future when it is ripe for decision.

We believe that this is quintessentially a situation where marketplace forces will accomplish the goals that a prior Commission — with a pro-

[3] We believe the records in the teletext and VBI proceedings suggest that it would be inappropriate to require carriage at this time for program-related teletext and other VBI services. The dockets in these proceedings will remain open.

regulatory philosophy and less understanding of the value of unregulation in fostering the development of telecommunication — would have tried to accomplish by imposing rules. We are of the view that the Commission cannot impose mandatory carriage unless and until we know that broadcasters and consumers will desire MTS and will be willing to pay for it, and that it will not be carried voluntarily by cable systems in response to market demand. Since MTS has not yet had the opportunity to develop, it is unreasonable to suggest that the heavy hand of government must interfere.

Surprisingly, some Commissioners appear to feel otherwise; yet no Commissioner is prepared to impose and implement mandatory carriage at this time. We recognize the inhibitory effect such a decision would have on the development of the technology and the additional costs it would impose unnecessarily and unjustifiably on cable operators and subscribers. The threat, which still hangs over the head of the cable industry after today's action, that some future Commission misguidedly might impose mandatory delivery obligations is mischievous enough regulatory intervention on its own. We hope it is not so destructive as to hamper the long sought-after growth and innovation by the cable industry.

Nonetheless, we can vote for this item because the Commission does decline to reach the decision about the need for, and propriety of, mandatory carriage of program-related MTS.

Comparative Coverage Issue
Comparative Issue, Contingent
Diversification, of Control of Mass Media
Frequency, Equitable Distribution Under 307(b)
Ownership and Management, Integration of
Reciprocal Service

Review Board affirmed ALJ's dispositive Section 307(b) issue choice of community and contingent comparative issue choice among applicants in comparative broadcast hearing. Board and ALJ rejected reciprocal service showing and based comparative choice on preferences for diversification of mass media control, ownership integration, and comparative coverage.
—*Caldwell Broadcasting Corp.*
BC Docket No. 82-453

FCC 85R-1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Caldwell Broadcasting Corporation Luling, Texas	BC Docket No. 82-453 File No. BPH-810818AP
New Thinking, Inc. Luling, Texas	BC Docket No. 82-456 File No. BPH-810819AP
Lockhart Radio Associates, Lockhart Radio, Inc., General Partner Lockhart, Texas	BC Docket No. 82-458 File No. BPH-810819BD
Central Texas FM Broadcasting, Inc. Luling, Texas	BC Docket No. 82-459 File No. BPH-810819BN
For Construction Permit For a New FM Station	

Appearances

Lawrence Bernstein and *Bruce A. Eisen,* on behalf of Caldwell Broadcasting Corporation; *Paul Y. Seligson* and *Barry A. Friedman,* on behalf of New Thinking, Inc.; *William S. Andrews, Richard D. Rockford,* and *Karen M. Anderson,* on behalf of Lockhart Radio Associates, Lockhart Radio, Inc., General Partner; and *James L. Winston, Walter E. Diercks,* and *Steven Nero,* on behalf of Central Texas FM Broadcasting, Inc.

DECISION

Adopted: January 2, 1985; Released: January 15, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. Lockhart and Luling are two small rural communities in south central Texas. Although located within 35 miles of Austin, the state capital, neither city is within the Austin urbanized area or is regarded as an Austin suburb.[1] At the start of this comparative broadcast proceeding,[2] six Lockhart and five Luling applicants were seeking authority to construct a new FM station on Channel 234C at their respective communities. The field subsequently narrowed to one applicant for Lockhart — Lockhart Radio Associates, Lockhart Radio, Inc., General Partner (LRI) — and three for Luling — Caldwell Broadcasting Corporation (Caldwell), New Thinking, Inc. (NTI), and Central Texas FM Broadcasting, Inc. (Central). The presently contested issues concern only which proposal will best provide a "fair, efficient, and equitable distribution of radio service" (choice of communities between Lockhart and Luling) — the standard Section 307(b) issue[3] — and, if no decisive community choice can be made, which applicant will best serve the public interest (contingent standard comparative choice among applicants).[4]

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[1] *See* Bureau of the Census, 1980 Census Report No. PC 80-1-A45 (Texas), p. 78. An "urbanized area" consists of a central city or cities and surrounding closely settled territory. *Id.* at App. A, p. 3.

[2] Hearing Designation Order, 47 Fed. Reg. 32782, released July 23, 1982.

[3] Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b).

[4] NTI's limited exceptions objecting to the refusal of presiding Administrative Law Judge Joseph Chachkin (ALJ) to add various issues against LRI and Central have no decisional significance in light of the result herein and will not be considered. Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2). Central's exception to the ALJ's refusal in Memorandum Opinion and Order, FCC 83M-1090, released April 4, 1983, to add a Section

2. In an Initial Decision (I.D.), FCC 84D-40, released June 8, 1984, the ALJ awarded a dispositive Section 307(b) preference to the Luling applicants, denied LRI's attempt to qualify for comparative consideration under the Review Board — discredited reciprocal service "doctrine," *see Kaldor Communications, Inc.*, 56 RR 2d 137, 141-42 (Rev. Bd. 1984), and concluded that NTI was the superior Luling applicant under the criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held November 20, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein, and affirm the ALJ's grant of NTI's application.

3. *Section 307(b) Issue.* Although we labelled FM Section 307(b) cases a "dying breed" some eight months ago in *Public Service Broadcasting of West Jordan, Inc.*, 97 FCC 2d 960, 964 n. 9, 55 RR 2d 1633, 1636 n. 9 (Rev. Bd. 1984), this is the fourth wraith we have encountered in the interim. Despite LRI's zeal, we cannot discern any significant differences between its proposal and the losing effort in *Public Service, supra*, and its doctrinal ancestors, *Bie Broadcasting Co.*, 81 FCC 2d 1, 48 RR 2d 471 (Rev. Bd. 1980), *rev. denied*, FCC 81-376, released July 31, 1981 (Comm'n), *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, released September 15, 1983 (Comm'n), *Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 54 RR 2d 923 (Rev. Bd. 1983), *rev. denied*, FCC 84-284, released June 19, 1984 (Comm'n), and *Kaldor Communications, supra.* In each instance, the Board upheld the rebuttable presumption that "local transmission service bestows such important benefits . . . virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations," *Pasadena Broadcasting Co.* v. *FCC*, 555 F. 2d 1046, 1050-51 (D.C. Cir. 1977), and granted the application that would bring the first local transmission service to a community. Moreover, in *Bie* and *Public Service*, as in the instant case, the choice was between a community with "only" a single daytime AM station (Lockhart) and one with absolutely no local radio station (Luling). Nevertheless, we now pause to "beat" LRI's "dead horse," rather than merely summarily affirm the ALJ's ample findings and conclusions on this issue, in order to distinguish our action herein from a companion FM case, *Hispanic Owners, Inc.*, FCC 84R-97, released January 7, 1985 (Rev. Bd.), in which we declined to award a dispositive Section 307(b) preference for a second local service at Rio Rancho, New Mexico versus a thirtieth service at Albuquerque.

1.65 reporting issue againt NTI is denied for the reasons stated by the ALJ. *See Merrimack Valley Broadcasting, Inc.*, FCC 84-496, released October 23, 1984 (Comm'n).

4. The salient feature of *Hispanic Owners* is that, in an FM context, the Board construed high-powered Class C station proposals for Rio Rancho and Albuquerque as metropolitan central city — plus — suburban community proposals and could not find "sufficient" differences between them to permit a "meaningful 307(b) choice," *Cosmopolitan Enterprises, Inc.*, 15 FCC 2d 650, 655, 14 RR 2d 1029, 1034 (Rev. Bd. 1968). *See Hispanic Owners, Inc., supra,* paras. 2-19. In applying the "urbanized area" policy of *Huntington Broadcasting Co.*, 14 FCC 563 (1950), *aff'd,* 192 F. 2d 33 (D.C. Cir. 1951), and its progeny to those FM applications, the Board explained in detail how the *Huntington* policy was inapplicable to the facts of *WHW Enterprises, Inc., supra,* and *Beaufort County Broadcasting Co., supra,* in both of which cases we specifically refused to apply *Huntington* and awarded dispositive Section 307(b) preferences. The same distinctions are present in the instant case.

5. As previously indicated in paragraph 1, *supra,* Lockhart and Luling are both rural, non-suburban communities. Neither is a "central city," unlike Albuquerque or Kalamazoo, Michigan (*WHW*), and neither is located within the urbanized area of a central city. Moreover, it is undisputed that Luling and Lockhart are separate communities politically, economically, sociologically, and geographically (they are 14 miles apart). I.D., paras. 6-13, 74-76. Finally, we note that both communities are small (the 1980 populations of Lockhart and Luling were 7,953 and 5,039, respectively) but fairly similar in size, yet only Lockhart has any local radio outlet. Under these circumstances, the fact that all four applicants propose 100 kilowatt Class C stations and that their primary service areas will encompass more than 600,000 persons,[5] *id.*, paras. 3, 4, must yield to the uniqueness of the proposed principal communities of license and their respective needs for local transmission services. We affirm the ALJ's conclusion that although Lockhart has a larger population than Luling, is county seat of Caldwell County, and has more governmental offices than Luling, these factors do not rebut Luling's presumptive need for a first local service.[6] *See Pasadena Broadcasting Co.* v. *FCC, supra; Bie Broadcasting Co., supra; WHW Enterprises, Inc.; supra; Beaufort*

[5] The ALJ concluded that there were already five or more daytime aural services available in the applicants' proposed service areas and three to five nighttime services. I.D., para. 5. These data appear to undercut an earlier Commission view, in the Lockhart Channel 234 assignment proceeding, 47 RR 2d 1598, 1600 (1980), that a Class C assignment was needed to bring significant first and second FM services to the area.

[6] While we agree with LRI that the ALJ should have accepted the nighttime emergency needs testimony of Lockhart's Fire Marshall without a special programming issue, *cf. Ruarch Associates,* 56 RR 2d 1593, 1595 n. 4 (Rev. Bd. 1984), its rejection was harmless error because the need described — access to a nighttime broadcasting source — could just as easily be met by a Luling fulltime station and is not a need unique to Lockhart.

County Broadcasting Co., supra; Kaldor Communities, supra; Public Service, supra.

6. Noting that the Luling proposals will also provide radio service to 100,000-200,000 more people overall than the Lockhart application and fourth and fifth nighttime services to some 7000 persons (while the Lockhart proposal will provide no additional service to underserved areas), I.D., paras. 4, 5, it becomes clear that Luling is the Section 307(b) winner over Lockhart on reception service as well as first transmission service grounds. *See FM Channel Policies/Procedures,* 90 FCC 2d 88, 90-93, 51 RR 2d 807, 809-11 (1982), *recon. denied,* 56 RR 2d 448 (1984); *Kaldor Communications, Inc., supra.* However, we agree with the ALJ that it is Luling's first transmission service advantage that is dispositive, not its reception service edge. I.D., paras. 75-76. *Compare Alessandro Broadcasting Co.,* 56 RR 2d 1568 (Rev. Bd. 1984) (no "meaningful" Section 307(b) preference for fourth service to 354 persons and a fifth service to 3234), *and Wilmer E. Huffman,* 32 FCC 1, 22 RR 820 (1962) (second daytime service, which was also first nighttime service for more than 9000 persons, outweighed smaller community's need for first local service), *with Meredith Colon Johnston,* 33 FCC 2d 324, 23 RR 2d 671 (Rev. Bd. 1972), *aff'd,* 39 FCC 2d 782 (1973) (substantial Section 307(b) preference awarded for fourth service to 296 persons and a fifth service to 499).

7. *Reciprocal Service "Doctrine."* LRI's exceptions anticipated that the Board might affirm the ALJ's award of a dispositive Section 307(b) preference to Luling. Hence, it also invokes reciprocal service arguments as an alternative basis for obtaining comparative consideration with the Luling applicants. In 1961, the Commission held in *Kent-Ravenna Broadcasting Co.,* 44 FCC 2603, 2607-08, 22 RR 605, 612, that an applicant for another community that proposes primary service to the favored community under Section 307(b) (in this case, Luling) could have full comparative consideration with applicants for the favored community if such applicant also meets the requirements of the rules for main studio location and program origination or successfully seeks a waiver of these requirements. In the instant case, LRI's former competitor, Cen-Tex Broadcasting Corporation, first raised the reciprocal service question at an October 8, 1982 prehearing conference in connection with its August 30, 1982 petition to enlarge issues seeking main studio location and program origination waivers. After discussion (Tr. 9-13), the ALJ added the waiver issues as to Cen-Tex in Memorandum Opinion and Order, FCC 82M-3181, released October 13, 1982. Apparently relying on these actions, LRI filed a similar petition to enlarge issues on December 3, 1982, as well as an application amendment proposing to locate an auxiliary studio in Luling. These filings were discussed at a further prehearing conference

on December 16, 1982 (Tr. 93-107), and the waiver issues were added as to LRI in Memorandum Opinion and Order, FCC 83M-153, released January 13, 1983, paras. 3-4, on the supposition that LRI placed a primary service contour over the entire city of Luling, citing *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 46 RR 2d 1467 (Rev. Bd. 1980).[7]

8. At hearing LRI conceded that its primary service (70 dBu) contour encloses only 97.7% of the area within the Luling city limits and 98.7% of the population. I.D., para. 78. While the ALJ initially agreed with LRI that "substantial compliance" with the coverage requirement was sufficient, he held in the I.D., para. 78, that strict compliance was necessary, citing *Kent-Ravenna, supra, Radio Greenbrier, Inc., supra,* and *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 51 RR 2d 389 (Rev. Bd. 1982). Hence, the ALJ concluded that LRI's request for reciprocal service consideration could not be entertained. Alternatively, he held that LRI's December 1982 auxiliary studio proposal, which came nine months after the "B" cutoff date of March 12, 1982 for application upgrading, was an impermissible upgrade and that LRI had failed to advance any persuasive public interest justifications for waiver of the main studio and program origination requirements. Here he noted, *inter alia,* that the Commission has never held that an auxiliary studio is a sufficient substitute for a main studio, that LRI's main studio at Lockhart is not readily accessible from Luling, and that LRI's Luling origination proposal was vague and inadequate. I.D., para. 79. Finally, the ALJ acknowledged that the Review Board recently declared the reciprocal service "doctrine" to be extinct in *Kaldor Communications, Inc., supra,* subject to revivification and rehabilitation by the Commission *en banc. Id.,* para. 77.

9. LRI's exceptions reiterate its "substantial compliance," auxiliary studio, and main studio and origination waiver arguments. We affirm the ALJ's rejection of LRI's reciprocal service showings on the merits, without relying on our *Kaldor* interdict of such efforts as litigation gimmickry. Indeed, LRI's delaying until nine months after the "B" cutoff date and four months after its application was designated for hearing before pursuing reciprocal service and proposing an auxiliary studio exemplifies the hollowness of the exercise. Similar antics were recently rejected in *Public Service Broadcasting of West Jordan, supra,* as untimely and insufficiently evidencing a public interest concern in serving the favored community, and the same result is warranted here. Our "hard look" at LRI's waiver requests, *WAIT Radio* v. *FCC,* 418 F. 2d 1153, 1157 (D.C. Cir. 1969), is similarly unavailing. And we reject LRI's "substantial

[7] LRI's auxiliary studio amendment was dismissed by the ALJ in Order, FCC 82M-4044, released December 22, 1982, on the grounds that no amendment was needed and that this proposal would be considered, *sans* amendment, under the main studio and program origination waiver issues. Tr. 102-03, 107.

compliance" quasi-waiver argument as contrary to established case precedent, *Kent-Ravenna, supra; Radio Greenbrier, supra; Cornwall Broadcasting Corp., supra. Cf. Basic Media, Ltd.* v. *FCC,* 559 F. 2d 830 (D.C. Cir. 1977) (no-waiver policy on short-spacing technical rule affirmed). Thus, we affirm the ALJ's conclusion that LRI is not entitled to comparative consideration with the Luling applicants. *See WHW Enterprises, Inc., supra.* We now turn to the contingent standard comparative issue.

10. *Contingent Comparative Issue: Diversification.* Of the three Luling applicants, NTI has no media interests. Two non-integrated Central principals, J. Livingston Kosberg and Robert Caplan, own a total of 30% of Central's stock and 19% of a Fort Worth, Texas station (205 air miles away) and 19% of a Houston television station (130 air miles away); they also have minor interests in Fort Worth and Houston subscription television ventures, and Kosberg has additional minor interests in a Houston cable television system and a Miami, Florida television station permittee. Finally, a 5% stockholder is editor-in-chief of the *Houston Chronicle,* a Houston newspaper with a daily circulation of 1612 copies and a Sunday circulation of 2924. Central's attributable interest in each medium is 6% or less.[8] I.D., paras. 51-55. On the other hand, Caldwell's 60% owner, Mediatex Broadcasting Corporation, is a wholly owned subsidiary of Mediatex Communications Corporation, which in turn is the 100% owner of Texas Monthly, Inc., which publishes a monthly regional magazine called "Texas Monthly" with a circulation of 280,000 copies state-wide, 30,000 within Caldwell's 60 dBu contour, and 285 in Luling and Lockhart. An MCC subsidiary puts out a similar magazine in California with a circulation of 250,000 copies, and a third subsidiary publishes books written by Texans or about Texas and markets them primarily in Texas. I.D., paras. 21, 24-27. The ALJ concluded that the media interests of Caldwell's principals were of "minor significance," *id.,* para. 82, but that those held by Central's principals were "slightly more significant" and "more numerous," *id.,* para. 83. As a result, he awarded NTI a "very slight" diversification preference over Caldwell and a "slight" preference over Central, and gave Caldwell a "very slight" preference over Central. *Id.*

11. All three applicants except to the ALJ's diversification evaluation. At one extreme NTI argues that it should have been awarded a substantial preference against both Central and Caldwell. At the other,

[8] In an August 7, 1984 amendment, Central reported that Valley Broadcasting Company is purchasing a Brownville, Texas television station (300 miles from Luling). Former 3% Central stockholder Billy Goldberg has an 85% interest in Valley. Hence, upon consummation of the purchase, Central will have a 2.55% attributable interest in the station (Goldberg withdrew from Central after the "B" cutoff date).

Caldwell asserts that absolutely no diversification demerit should be assessed against it, citing *Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275 (Rev. Bd. 1984), and that NTI and it deserve slight diversification preferences over Central. In between, Central urges that NTI should have no more than a slight preference over it and, most properly, either no preference or only a very slight preference.

12. The appropriate weight to be given to media interests under the diversification criterion is directly related to the type of media, size of ownership interest, proximity of media to applicant's proposed community of license, significance of media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective localities. *Policy Statement, supra,* 1 FCC 2d at 395, 5 RR 2d at 1909. Using these guides, it becomes clear that Central's attributable subscription television and cable television interests are not decisionally significant here. *See Colorado Television, Inc.,* 56 RR 2d 1080, 1086-87 n. 11 (Rev. Bd. 1984) (subscription television programming interests not cognizable for diversification purposes); *Greater Wichita Telecasting, Inc.,* 96 FCC 2d 984, 988, 55 RR 2d 926, 929-30 (1984). What remains are two minute interests in non-service area television stations, one minute interest in a distant (Florida) television station, and one minute interest in a small non-service area daily newspaper. In contrast, Caldwell is charged with a 60% interest in a major regional monthly magazine that has a 30,000-copy circulation within Caldwell's proposed service area. (The California monthly magazine and MCC's book publishing company have *de minimis* decisional significance here). With these refinements, we conclude that Central's attributable media interests are not *more significant* than Caldwell's although they are slightly *more numerous.* Rather, noting that none of the applicants' media interests are in the FM service,[9] we are faced with a balanced assortment of semi-distant, marginally owned television stations (and a minor interest in a minor newspaper) versus a major interest in a major service-area monthly magazine. Accordingly, we conclude that Central and Caldwell stand equal and do not merit any diversification preference against each other; however, NTI warrants a *slight* diversification preference against *both* of them.[10]

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[9] Media interests in the same type of service as the subject applications are more significant *per se* than other media holdings. *Daytona Broadcasting Co., Inc.,* 55 RR 2d 1326, 1355 (Rev. Bd. 1984).

[10] The "Texas Monthly" is a much more significant media interest in terms of attributable ownership percentage, type of journal, and local and overall circulation than any of the magazines or newspapers discussed in *Minority Broadcasters of East St. Louis, Inc., supra, Greater Wichita Telecasting, Inc., supra, Merrimack Valley Broadcasting, Inc.,* 92 FCC 2d 506, 517, 52 RR 2d 1210, 1218 (Rev. Bd. 1982), *rev. denied,* 55 RR 2d 23 (Comm'n 1983), or *Daytona Broadcasting Co., Inc., supra* note 9. Yet in each of these

13. *Integration of Ownership and Management.* The ALJ awarded 45% quantitative ownership integration credit to NTI, based on the integration proposals of Mark and Nancy Grubbs (husband and wife), who each have a 22.5% ownership interest and will serve as full-time general manager and business manager, respectively. Although Central proposed the full-time integration of 38% of its ownership, the ALJ credited only the participation of 15% owner Mark A. Goldberg as full-time sales manager; 5% owner Rudy Ruiz as full-time general manager; 4% owner Samuel De Leon as full-time news director; and 5% owner Edna Ramon as full-time public affairs director. This 29% quantitative credit became 24% as of July 30, 1984, when Central amended its application to reflect that Edna Ramon was no longer a Central stockholder. In initially reducing Central's credit to 29%, the ALJ disallowed the proposed part-time integration of 4% owner Hector De Leon as assistant public affairs director and the proposed full-time participation of 5% owner Booker T. Morris, III as station manager. Finally, the ALJ completely disallowed Caldwell's proposed 30% full-time integration credit for Robert F. Botik as vice-president for operations and director of programming and 10% full-time credit for Rene Campos as general manager/sales manager. After adding appropriate qualitative enhancement credits, he concluded that NTI was entitled to a slight overall integration preference over Central and a moderate preference over Caldwell, and that Central merited a slight integration preference over Caldwell. I.D., para. 89.

14. *Challenges to Quantitative Integration Credit.* Attacking the front-runner, Central's exceptions urge that NTI's 45% integration credit should be reduced to 7.2% to reflect a presumption that J. David Bamberger, NTI's non-integrated putative 55% owner, will supply sufficient additional capital under a January 31, 1981 pre-incorporation agreement (as amended on August 1, 1981 and March 5, 1982) to increase his ownership share to 92.8%. In this connection Central maintains that the ALJ erred in Memorandum Opinion and Order, FCC 84M-1208, released March 12, 1984, by not convening a further hearing to explore the "extended and unexplained" unemployment of Mark Grubbs since September 30, 1983 and Nancy Grubbs since July 31, 1983. It is Central's theory that these unemployment periods significantly bear on the Grubbs' work experience credentials, their ability to effectuate their NTI integration proposals, and their ability to provide $124,500 in additional capital

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cases a "very slight" diversification preference was accorded. *A fortiori,* Caldwell's more significant interest deserves a commensurately greater preference for NTI. Similarly, NTI deserves a slight preference vis-a-vis Central to reflect the significance of Central's two in-state broadcast interests (soon to become three—see note 8, *supra*) and its other attributable media interests. *Cf. Phoenix Media Corp.,* 56 RR 2d 1241, 1245 (Rev. Bd. 1984) (moderate preference for controlling interests in four in-state broadcast stations).

contributions to NTI under the aforementioned amended pre-incorporation agreement. As to the financial implications of the Grubbs' unemployment, Central stoutly maintains that it is not attempting to collaterally attack NTI's financial qualifications because it concedes that Bamberger has sufficient financial resources to cover any shortfall in the Grubbs' contributions. For its part, Caldwell challenges only the allegedly non-managerial nature of at least 40% of Nancy Grubbs' proposed integration duties. It notes that she will only serve as business manager for 60% of a typical work week (Tr. 463-464), questions the managerial nature of some of these tasks, and charges that the remainder of her proposed tasks, such as directing all locally produced programming (Tr. 424), are clearly non-managerial; hence, NTI is entitled to no more than part-time integration credit for Mrs. Grubbs, if any at all.

15. We affirm the ALJ's grant of 45% full-time integration credit to NTI. As the ALJ properly concluded, Central's misgivings about the Grubbs' employment status and finances are purely speculative and hypothetical. While it is true that the Commission will permit the probing of documented allegations of employment misconduct by principals of an applicant, *e.g., Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983) (failure to remit withheld federal income taxes), it is disinclined — on procedural and humanitarian grounds — to countenance fishing expeditions into principals' private lives without adequately supported preliminary charges and indications of evidentiary relevance, *e.g., FBC, Inc.*, 95 FCC 2d 256, 55 RR 2d 1344 (Rev. Bd. 1983) (refusal to permit inquiry into "vagabond life-style" and "peripatetic existence" upheld). Central's unemployment allegations are wide of the mark on both grounds. Moreover, we note that by amendment filed on September 12, 1984, pursuant to Section 1.65 of the Rules NTI reported that Mark Grubbs has resumed work and is now director of sales and marketing for Stations KONO and KITY(FM), San Antonio, Texas. As to the Grubbs' ability to finance their proposed capital contributions, we note that they have already paid in $24,000 of their maximum $148,500 contribution to NTI, and we agree with the ALJ that their $135,000 loan commitment letter from the Frost National Bank of San Antonio (NTI Exh. 11) establishes reasonable assurance that they will be able to meet their remaining financial obligation to NTI. I.D., para. 87. Central has no evidence to the contrary. Finally, we conclude that Nancy Grubbs is entitled to full-time managerial credit for her proposed role as a business manager who will also "direct station efforts aimed to alerting the community to the station's participating in civic affairs and alerting the station's management to community needs and interests" (NTI Exh. 3). This latter role is usually denominated as community or public affairs director and has been specifically recognized and credited as a manage-

ment-type position. *See Merrimack Valley Broadcasting, Inc., supra* note 10, 92 FCC 2d at 511, 52 RR 2d at 1214; *Minority Broadcasters of East St. Louis, Inc., supra,* at 280. The fact that only Mrs. Grubbs' direct evidence (NTI Exh. 3) describes her second role does not deprive her of credit for it, absent countervailing evidence which Caldwell does not supply. And the record evidence concerning her business manager duties (Tr. 465-470) is fully adequate to justify that role.

16. Next, Central excepts to the ALJ's disallowing of integration credit for Hector De Leon and Booker Morris. The ALJ concluded that De Leon's proposed role as assistant public affairs director was not a management level position and that, even if it were, De Leon's ability to fulfill his 20 hour per week commitment was subject to serious doubt because of the priority he would give to his Austin law practice (40-60 hours) and his 1-1/2 hour round trip commute between Austin and Luling. I.D., para. 88. Central maintains that a 60-80 hour work week for De Leon is feasible, that similar proposals have been credited by the Commission, citing *Peoples Broadcasting Corp.,* 94 FCC 2d 429, 435-36, 53 RR 2d 1210, 1214 (Rev. Bd. 1983); *Brownfield Broadcasting Corp.,* 93 FCC 2d 1197, 1199-1200, 53 RR 2d 1175, 1178 (Rev. Bd. 1983); and *Central Texas Broadcasting Co., Ltd.* 90 FCC 2d 583, 585-86, 51 RR 2d 1478, 1481 (Rev. Bd. 1982), that De Leon's role is managerial, and that a similar assistant management position was credited in *Absolutely Great Radio, Inc.,* 95 FCC 2d 1023, 1030, 55 RR 2d 15, 22 (1983). We reject all of these contentions. While we cannot say as a matter of law that 60-hour work weeks are incapable of effectuation, *Radio Jonesboro, Inc.,* 96 FCC 2d 1106, 1108, 55 RR 2d 991, 993 (Rev. Bd. 1984), none of the cited cases endorses an 80-hour proposal,[11] and we decline to do so. Similarly, we recently declined to award integration credit for the roles of part-time assistant sales manager and part-time assistant program director, *High Sierra Broadcasting, Inc.,* 96 FCC 2d 423, 428, 55 RR 2d 627, 632 (Rev. Bd. 1983), *rev. denied,* 56 RR 2d 1394 (Comm'n 1984), and De Leon's proposal is legally and factually indistinguishable.[12]

17. As to Morris, while noting his nominal title as station manager, the ALJ held that the role he described did not involve management responsibilities and was basically a consultative position. I.D., para. 88. In rebuttal Central argues that the ALJ construed Morris' supervisory role

[11] Where, as here, a range of hours for a broadcast/nonbroadcast work schedule is given, it is proper to focus on the maximum total number of hours in measuring ability to effectuate because the proponent of that schedule is certifying his willingness to implement it on a worst-case basis in order to fulfill his minimum integration commitment.

[12] Central's reliance on *Absolutely Great Radio, Inc., supra,* is misplaced because there the credited principal was proposed as full-time director of public and minority affairs as well as assistant program director.

over the proposed station's chief engineer and program director too narrowly and penalized him because, lacking broadcast experience, Morris could not describe his duties to the ALJ's satisfaction. We have carefully reviewed Morris' 117 pages of hearing testimony (Tr. 859-975) and conclude that he has indeed described — at length — a policy-making and managerial role at Central's proposed station and that he fully understands that role; the "only" difficulty is that the role is so narrowly drawn in terms of direct supervisory relationships and day-to-day responsibilities that we can properly doubt that it amounts to full-time work. Indeed, when the ALJ asked Morris how 40 hours would be occupied, he replied (Tr. 890): ". . . if they didn't need me for 40 hours a week . . . the president would fire me." Hence, we will grant Central's exception in part and award it slight credit for Morris' management role. *See Family Broadcasting Group,* 93 FCC 2d 771, 778, 53 RR 2d 662, 668 (Rev. Bd. 1983), *rev. denied,* FCC 83-559, released November 29, 1983 (Comm'n).[13]

18. Finally, Caldwell of course vigorously assails the ALJ's refusal to accord it any integration credit because of his conclusion that proposed 40% integrated stockholders Botik and Campos are not "true and actual" owners. I.D., para. 85. However, we need not reach these exceptions because, as we will explain *infra,* even if Caldwell were to receive its requested 40% full-time integration credit (which we will assume *arguendo*), it would still finish behind NTI in the overall comparative evaluation.

19. *Challenges to Qualitative Integration Credit.* The ALJ awarded NTI "very slight" qualitative enhancement credit for its 22.5% female participation; "slight" credit for the Grubbs' service area residence in San Antonio but no San Antonio civic participation credit because it was not shown that those activities occurred within the 16.9% of the city that lies within NTI's proposed service area; minor credit for Mark Grubbs' past broadcast experience since 1965; and no credit for the Grubbs' proposed future residence in Luling. I.D., para. 87. NTI has excepted to all of these judgements except the past broadcast credit. We will grant each exception. As to female participation credit, the Commission recently held in *Horne Industries, Inc.,* 56 RR 2d 665, 667-68 (1984), that even where integrated minority ownership (and, by implication, female ownership) is less than 50%, enhancement credit should be accorded in direct proportion to the degree of integrated minority (or female) ownership. Hence, NTI deserves more than "very slight" credit for its 22.5% female participation. Likewise, under *Waters Broadcasting Corp.,* 91 FCC 2d 1260, 52 RR 2d

[13] We deny NTI's and Caldwell's exceptions to Central's integration credit for the roles of Rudy Ruiz and Samuel De Leon (see paragraph 13, *supra*). We are satisfied that both men adequately described managerial positions and will be able to effectuate their full-time proposals. *See Family Broadcasting Group, supra,* and *Peoples Broadcasting Corp., supra.*

1063 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F. 2d 601 (D.C. Cir. 1984), NTI deserves greater credit for the 45% Grubbs' residence within the service area since 1970, and we believe that this credit should be further enhanced by their extensive San Antonio civic activities (dating back to 1976) even if they have not been shown to have taken place within the "right" 16.9% of San Antonio.[14] Finally, the Grubbs' proposed future residence in Luling warrants slight additional "residence" credit under the *Policy Statement, supra.*

20. Central received "very slight" enhancement credit for its proposed 14% minority integration participation and "slight" service area residence and civic participation credit for 29% of its owners from the ALJ. I.D., para. 88. The Board's integration rehabilitation of Booker Morris (paragraph 17, *supra*) nominally balances Central's 5% Ramon integration loss (paragraph 13, *supra*), but we have held that in applying qualitative enhancements, the enhancements attributable to less than full-time integration proposals do not have an equal enhancing effect. *See New Continental Broadcosting Co.*, 96 FCC 2d 544, 548, 55 RR 2d 413, 416 (Rev. Bd. 1983). Thus, Central's minority qualitative enhancement credit is now based on only 9% *full-time* (and 5% "slight") integration and its residence/civic credit, on only 24% *full-time* (and 5% "slight") quantitative integration. Under these circumstances, while Central weakly argues in its exceptions that it is entitled to greater enhancement credit, we affirm the ALJ's conclusions, even when they are reevaluated in light of the *Horne* and *Waters* cases, *supra. See* paragraph 19, *supra.*

21. The ALJ made enhancement credit findings as to Caldwell, I.D., paras. 29-34, but drew no conclusions because of his disallowance of any quantitative integration credit. Caldwell excepts and urges that it deserves "moderate" qualitative enhancement credit for 30% owner Botik's service area residence since 1971 and 10% owner Campos' life-long service area residence in Austin; a "preference" for Campos' Austin civic activities since 1976; "further" credit for Botik's broadcast experience since 1962 and Campos' broadcast experience since 1976; and "additional" credit because Campos is an Hispanic American. Br. at 15. Compared to NTI and Central, and again assuming *arguendo* that Caldwell received its requested 40% quantitative integration credit (see paragraph 18, *supra*), case precedent indicates that Caldwell would deserve approximately the same service area residence enhancement credit as NTI, less civic participation enhancement than either NTI or Central, more broadcast experience credit than NTI, and less minority enhancement credit than

[14] Certainly civic activities benefit an *entire community*, and what the Grubbs learned about San Antonio's needs and interests through their civic work in one part must be deemed relevant to their knowledge of, and responsiveness to, the needs and interests of the city as a whole.

Central or than NTI's female enhancement credit. *See Waters Broadcasting Corp., supra; Horne Industries, Inc., supra; Radio Jonesboro, Inc., supra; Jerome Thomas Lamprecht,* FCC 84R-93, released December 17, 1984 (Rev. Bd.); *New Continental Broadcasting Co., supra* (qualitative credit is proportional to quantitative ownership).

22. Combining the preceding separate analyses of the Luling applicants' quantitative and qualitative integration credits, we affirm the ALJ's conclusion that NTI deserves a slight overall integration preference over Central and at least a slight overall preference over Caldwell (a moderate preference if Caldwell receives no quantitative credit). See I.D., para. 89. NTI actually enjoys a "clear" quantitative integration advantage over Central (45% full-time versus 24% full-time) and over Caldwell *sans* integration credit (45% versus 0%), which cannot be overcome by their qualitative attributes. *See Van Buren Community Service,* 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981), *rev. dismissed,* 50 RR 2d 1433 (Comm'n 1982). However, even if this were not so, *i.e.,* assuming *arguendo* that Caldwell received its 40% full-time integration credit, NTI's enhancement credits for female participation, future Luling residence, and past service area residence and civic participation exceed Central's and Caldwell's qualitative enhancements, and Caldwell's edge over NTI in terms of previous broadcast experience is not enough to overcome the other enhancement credits and NTI's slight quantitative integration advantage. *See Policy Statement, supra,* 1 FCC 2d at 396, 5 RR 2d at 1910 (broadcast experience is "of minor significance" in comparing applicants for permanent broadcast authorizations since it generally confers only an initial advantage and so as not to discourage inexperienced newcomers); *Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 653, 53 RR 2d 953, 961 (Rev. Bd. 1983), *rev. denied,* FCC 84-161, released April 13, 1984 (Comm'n).

23. *Comparative Coverage.* The ALJ awarded NTI and Central a slight comparative coverage preference over Caldwell to reflect an 8.3% overall service advantage (852,520 persons versus 787,184) and the fact that NTI and Central will provide new fourth and fifth nighttime services to 235 more persons (3.3%) than Caldwell. I.D., paras. 4, 5, 90. We shall reduce this preference to a very slight one to conform with established precedent in cases where, as here, there are already five or more daytime services and three to five nighttime services throughout the proposed service areas and NTI's and Central's new fourth and fifth service advantage is so slight. *See Family Broadcasting Group, supra; Radio Jonesboro, Inc., supra; CJL Broadcasting, Inc.,* 88 FCC 2d 750, 50 RR 2d 1159 (Rev. Bd. 1981), *reversed on other grounds,* 54 RR 2d 1037 (Comm'n 1983).

24. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. Under the "best practicable service" criterion of the *Policy Statement, supra,* NTI has been awarded a slight overall integration preference over Central and at least a slight overall integration preference over Caldwell. In addition, NTI and Central warrant a very slight comparative coverage preference over Caldwell. To these preferences is added NTI's slight diversification preference over both Central and Caldwell. These preferences, albeit slight, are sufficient for us to conclude that grant of NTI's application will best serve the public interest, convenience, and necessity.

25. ACCORDINGLY, IT IS ORDERED, That the motions for leave to amend filed by Central Texas FM Broadcasting, Inc. on July 30, August 7, and August 23, 1984, and by New Thinking, Inc. on September 12, 1984 ARE GRANTED, and the amendments ARE ACCEPTED; and

26. IT IS FURTHER ORDERED, That the contingent motion to reopen the record and remand filed by New Thinking, Inc. on August 10, 1984 IS DISMISSED; and

27. IT IS FURTHER ORDERED, That the motions to correct transcript of oral argument filed by New Thinking, Inc., Central Texas FM Broadcasting, Inc. and Lockhart Radio Associates, Lockhart Radio, Inc., General Partner, on November 28, December 4, and December 12, 1984, respectively, ARE GRANTED; and

28. IT IS FURTHER ORDERED, That the application of New Thinking, Inc. (File No. BPH-810819AP) for authority to construct a new FM broadcast station at Luling, Texas IS GRANTED, and the applications of Caldwell Broadcasting Corporation (File No. BPH-810818AP), Lockhart Radio Associates, Lockhart Radio, Inc., General Partner (File No. BPH-810819BD), and Central Texas FM Broadcasting, Inc. (File No. BPH-810819BN) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 84D-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Caldwell Broadcasting Corporation Luling, Texas	BC Docket No. 82-453 File No. BPH-810818AP
New Thinking, Inc. Luling, Texas	BC Docket No. 82-456 File No. BPH-810819AP
Lockhart Radio Associates, Lockhart Radio, Inc., General Partner Lockhart, Texas	BC Docket No. 82-457 File No. BPH-810819BD
Central Texas FM Broadcasting, Inc. Luling, Texas	BC Docket No. 82-458 File No. BPH-810819BN
For Construction Permit for a New FM Station	

Appearances

Bruce A. Eisen, on behalf of Caldwell Broadcasting Corporation; *Paul Y. Seligson* and *Barry A. Friedman,* on behalf of New Thinking, Inc.; *Michael Finkelstein, William S. Andrews* and *Shelby D. Green,* on behalf of Lockhart Radio Associates, Lockhart Radio, Inc., General Partner; *James L. Winston and Walter Diercks,* on behalf of Central Texas FM Broadcasting, Inc.; and *Norman Goldstein,* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 31, 1984; Released: June 8, 1984

Preliminary Statement

1. The Commission, by Hearing Designation Order released July 23, 1982, designated for hearing eleven mutually exclusive applications for a new FM broadcast service on Channel 234C. Seven of the applications have been dismissed,[1] leaving the four applicants listed in the caption. Lockhart Radio Associates, Lockhart Radio, Inc., General Partner (LRI) proposes Lockhart, Texas as its city of license; the remaining applicants, Caldwell Broadcasting Corporation (Caldwell), New Thinking, Inc. (NTI), and Central Texas FM Broadcasting, Inc. (Central) propose Luling, Texas. The presently applicable issues in the case are as follows:

1. To determine the areas and populations which would receive primary aural service (1 mV/m or greater) from the proposed operations, and the availability of other primary service to such areas and populations.

2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine in the event that it is decided that Section 307(b) is conclusive and that Luling, Texas has the greater need for a first local broadcast outlet, whether a waiver is warranted of Section 73.1125 and 73.1130 of the Commission's Rules as it relates to the proposal of Lockhart Radio Associates.[2]

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.[3]

2. Prehearing conferences were convened on November 12 and 24 and December 16, 1982. Hearing sessions were held on February 14, 15, 16, 17, 22 and 23, March 1, and April 6, 1983. The record was closed on April 6, 1983 (see *Order,* FCC 83M-1178, released April 11, 1983). The record was reopened to receive Joint Stipulations 3 and 4[4] and reclosed by *Orders,* FCC 83M-1420 released May 2, 1983 and FCC 83M-1649, released May 18, 1983. By *Order,* FCC 83M-4364, released November 28, 1983, the

[1] Lockhart Radio, Inc. and Cen-Tex Broadcasting Corporation merged their interests and formed a limited partnership under the name of Lockhart Radio Associates. Lockhart Radio, Inc. is the general partner. See *Order,* FCC 83M-1656, released May 18, 1983. To avoid confusion, the letters "LRI" which were used to identify exhibits in this proceeding, will be used throughout and refers to the application of Lockhart Radio Associates.

[2] Issue added by Order of the Presiding Judge (FCC 83M-153, released January 13, 1983).

[3] The *Designation Order* included a main studio issue against Central and an air hazard issue against LRI. Both were resolved by summary decisions in favor of these applicants. See FCC 82M-3702, released November 22, 1982; FCC 83M-215, released January 18, 1983.

[4] Joint Stipulation 3 concerned the government offices in Lockhart and Luling. Joint Stipulation 4 stipulated that the proposals of NTI and Central were the same for comparative coverage proposals.

Presiding Judge reopened the record and added an air hazard issue against NTI and Central. The issue was added because of the FAA's suspension of its determination that NTI's and Central's proposed transmitter site did not constitute a hazard to air navigation. By *Order*, FCC 84M-809, released February 15, 1984, the Presiding Judge accepted NTI's and Central's amendment providing for a tower than is 200 feet shorter than earlier proposed, and including an FAA determination that the tower site, as amended, would not constitute a hazard to air navigation. The Presiding Judge also summarily resolved the air hazard issue in favor of NTI and Central.[5] By *Order*, FCC 84M-1207, released March 12, 1984 the Presiding Judge received into evidence Joint Exhibits 1A and 1B which replace Joint Exhibit 1 and reclosed the record. The revised exhibit (a comparative coverage study of the applicants' proposals) contained changes in NTI's and Central's coverage proposals resulting from their amended antenna tower proposal. Proposed findings of facts and conclusions were filed on June 15, 1983; replies were filed on June 29, 1983. Supplemental findings of fact and conclusions were filed on March 23, 1984.[6]

Findings Of Fact

Areas and Populations (issue 1)

3. Each applicant seeks a permit to construct a Class C FM station on Channel 234 (94.7 mHz). With the exception of LRI of Lockhart, Texas, which proposes to serve Luling under the "reciprocal service" doctrine, all of the remaining applicants propose Luling, Texas. All of the applicants propose to operate with an effective radiated power of 100 kilowatts. The applicants' antenna center of radiation height above average terrain (HAAT) ranges from 982 feet to 1281 feet (Joint Ex. 1B, p. 3).

4. Since some of the applicants propose different sites and HAAT's there would be differences in locations and sizes of their primary service areas. The areas and populations involved are tabulated below (Joint Exhibit 1B, p. 3):

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[5] The Presiding Judge also received in evidence NTI Exhibit 10A. The exhibit replaces NTI Exhibit 10 dealing with the location of the homes of NTI principals within the predicted 60 dBu contour of its proposed radio station. The changes were necessary because of NTI's amendment of its antenna tower proposal.

[6] The supplemental findings relate to the coverage changes reflected in Joint Exhibits 1A and 1B and their effect on the 307(b) and comparative coverage aspect of the standard comparative issue.

Applicant	*Primary Service* *Area (sq. mi.)*	*Population*
Caldwell	7,371	787,184
NTI[7] and Central[7]	7,609	852,520
LRI	6,206	678,262
Caldwell over LRI	1,165	108,922
NTI and Central over LRI	1,404	174,258
NTI and Central over Caldwell	238	65,336

5. During the daytime, there are five or more existing aural broadcast services available to the proposed uncommon service areas (Jt. Ex. 1A, p. 4). At night, the number of existing aural broadcast services in the uncommon area ranges from three to five or more (Jt. Ex. 1B, p. 3). The following is a tabulation of nighttime primary aural service presently available to uncommon 1 m/m service area (Jt. Ex. 1B):

Available services	*Caldwell*		*NTI and Central*	
	Area (sq. mi.)	*Population*	*Area (sq. mi.)*	*Population*
Three	313	1,508	375	1,673
Four	104	5,606	111	5,676
Five or more	749	101,808	918	166,909

Section 307(b) (issue 2)

6. The Commission's *Report and Order* in BC Docket No. 79-256, FCC 80-473, released August 8, 1980, assigned Class C Channel 234 to Lockhart, Texas. As mentioned previously, there are two proposed communities of license in this proceeding — Lockhart and Luling, Texas. Those applicants who sought Luling as their community of license relied upon Section 73.203(b) of the Commission's Rules which allowed applicants to propose Class C channels in communities within 15 miles of the listed community in the FM Table of Assignments. The distance between Lockhart and Luling is fourteen miles, and driving time from one community to the other is fifteen minutes (LRI Ex. 7).

7. *Lockhart, Texas* is the county seat of Caldwell County (LRI Ex. 6(b)). The 1980 population of Lockhart was 7,953. The Lockhart *Post Register* is a newspaper printed weekly in that community. Lockhart is also served by a local, broadcast transmission service, Standard Broadcast Station KCLT which operates on the frequency 1060 KHz, with 250 watts daytime. (Caldwell and NTI Jt. Ex. 1, p. 5). There are 16 county government offices; three district government offices; 7 state governmental offices; and 5 federal government offices located in Lockhart (Stipulation of the Parties, April 13, 1983).

8. *Luling, Texas* has no local, transmission broadcast facility. The Luling *News Signal* is published weekly in the city. In 1980 the population of Luling was 5,039, up from 4,719 in 1970. In the last twenty years, the

[7] See *Order*, FCC 83M-1649, released May 18, 1983, accepting Joint Stipulation No. 4.

city population has grown by 14% and in the last ten years it has grown by 6.8%. The last census showed that Luling's population was 79.9% White, 13.9% Black, 2% American-Indian, Eskimo or Aleut, .06% Asian or Pacific Islander, and 5.9% "Other." People of Spanish origin accounted for 26.6% of the city population. In 1980 the Luling median income was $12,415.00 per family.

9. Luling is governed by a city council, composed of an elected mayor and five council members. This body has the power to pass ordinances and to promote the health, safety, and convenience of the residents of, and visitors to, the city. The city employs a city manager, who is responsible for hiring all other city employees, including the building inspector, the police chief, and the city's five policy officers. The Luling fire department serves the southern portion of Caldwell County in addition to Luling itself. The department has ten vehicles, four full-time firemen, a part-time fire chief, and twenty-eight volunteers.

10. Luling has its own independent school district, which is governed by the Luling School Board. As of the week of December 13 through 17, 1982, enrollment for kindergarten through sixth grade was 825, and enrollment for grade seven through twelve was 527. Administration and support staff total twelve persons, and eighty-one teachers were employed by the school district.

11. The city is served by five medical doctors and three dentists. It operates a 30-bed general hospital with a total of 35 doctors on call from nearby towns. In addition, Luling and Caldwell County share the expense of maintaining two emergency medical vehicles to serve the area. There are three nursing homes which operate in Luling.

12. Luling is served by two commercial banks and a savings and loan. As of September 30, 1982, deposits for these three financial institutions amounted to $55,373,535.00, an increase of 64% over the figure for September 30, 1978. According to the 1972 Census of Retail Trade, 39.1% of all of the retail establishments in Caldwell County were located in Luling. These establishments accounted for 38.5% of the $27,596,000.00 of sales in the county at that time. The largest employer in Luling is the Luling Poultry Processing Company, with 144 employees (Caldwell-NTI Jt. Ex., pp. 1-5). There are 4 county government offices; 2 state government offices; and 1 federal government office located in Luling (Stipulation of the Parties, April 13, 1983).

13. There is a Chamber of Commerce at Luling which has approximately 140 members who support the chamber with voluntary dues. The city has a library which includes 13,000 volumes. There are four city parks. Luling is the home of 20 service organizations including Kiwanis, Lyons, Jaycees, and LULAC (Caldwell-NTI Jt. Ex. 1, pp. 1-5).

LRI's Reciprocal Service Proposal (issue 3)

City-Grade Coverage of Luling

14. Louis R. duTreil, a registered professional engineer, utilized a city map of Luling, Texas prepared by National Engineering Company, Inc. and updated December 6, 1979, to depict the city limits. In addition, he drew a portion of the predicted 70 dBu contour of LRI on the map. The 70 dBu contour of LRI encloses 97.7 percent of the area within the Luling city limits and 98.7 percent of the population. The portion of the city not included within the 70 dBu contour is a park and sparsely settled area in the extreme southeastern portion of the city limits. The Hillcrest Manor Nursing Home and one other residence are within the city limits but outside of the 70 dBu contour. The nursing home director advised that the home is licensed for 60 persons. Three persons have been assumed to occupy the residence located beyond the 70 dBu contour. These 63 persons represent 1.3 percent of the Luling population. Therefore, LRI provides 70 dBu coverage to 98.7 percent of the city's population. duTreil relied upon the engineering showing in LRI's application and upon supplemental radials to determine LRI's 70 dBu contour (LRI Ex. 9, pp. 1-2).

15. Drew Larson, a registered engineer presented rebuttal engineering testimony on behalf of Caldwell. According to Larson, his engineering study depicts the more current city boundaries for Luling, Texas as of February 23, 1983. Utilizing these updated city boundaries and primarily the Tech Note 101 method for calculating coverage, Larson concluded that there were additional areas in Luling, not noted by du Triel which would receive less than 70 dBu service by the proposed LRI facility. Specifically, Larson found an additional shadow pocket within the previous limits and new shadow areas based on the revised city limits. Based upon Larson's study, the areas of LRI's deficient city service comprise 5.8 percent of the area of Luling (Caldwell Rebuttal Ex. 1, pp. 1-3). According to Larson, the use of Tech Note 101 is appropriate for the terrain in the Luling area, even though he admitted that the terrain did not depart widely from the average elevation in the 2-10 mile sector. He claimed that he was not using Tech Note 101 to predict a contour location, but rather to predict a field strength within a shadow area. Larson explained that the Tech Note 101 method was used primarily to evaluate the losses behind the transmitter's obstacle, up to the receiver location. He used the usual FCC 50/50 method to compute the field at the transmitter's obstacle. This combination approach was a common practice at his firm (Caldwell Rebuttal Ex. 1, pp. 4-6; Tr. 1159-60, 1180-82).

16. According to Robert M. Silliman, a registered engineer, the Luling terrain is inappropriate for utilization of Tech Note 101, because terrain features similar to those found in Luling were incorporated in the establishment of the FCC 50/50 curves (LRI Ex. 9, p. 6). Silliman's expert

opinion was corroborated by the expert testimony of Jules R. Cohen, a registered engineer. According to Cohen, the terrain in the Luling area is the type contemplated by the field strength curves which are incorporated in the FCC Rules. He also testified that the standard prediction method is likely to lead to a more accurate result than any other method, such as Tech Note 101. Thus, Cohen concluded that in this instance only the FCC prediction method is appropriate (Tr. 1222).

Waiver of Sections 73.1125[8] *and 73.1130*

17. LRI intends to maintain an office/studio at Luling which will have the capability of originating local programming. LRI has not specified the amount of time it will devote to programs originating from Luling or any particular program or programs that the Luling auxiliary studio would originate. The studio also will be used as a Luling base of operations for the news and public affairs announcer/producer and the sales manager under the supervision of the General Manager. Luling Public Affairs programming and live Luling news coverage is to be broadcast from the office/studio at Luling. That facility will also be utilized for taping of public affairs announcements and programming. LRI intends to centrally locate the Luling office/studio and to staff it during normal business hours. A duplicate public inspection file will be maintained there, and the station's personnel will be responsible for continuing ascertainment of Luling's community concerns (LRI Ex. 5). At the time that the original application was filed, LRI proposed ten employees. James Van Sickle, an LRI principal, testified that if the application were granted, an eleventh employee would work full-time at Luling (Tr. 631). Prior to September 1982, LRI had no intention of placing an auxiliary studio in Luling (Tr. 636).[8a] Martha Elizabeth Martinez, an integrated LRI partner, would operate out of the Lockhart main studio as News and Public Affairs Announcer/Producer. However, Ms. Martinez would also be available at Luling on an as needed basis (Tr. 652-653).

18. Van Sickle testified that LRI had not yet attempted to locate studio space at Luling (Tr. 654). He initially stated that he had not reviewed the expenses attendant to linking an auxiliary studio at Luling to the main studio at Lockhart (Tr. 655), but contemplated the use of turntables, two reel to reel recorders, and microphones at the Luling facility. Van Sickle was not sure whether the auxiliary studio could communicate with the main studio at Lockhart without a dedicated

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[8] Section 73.1125 provides that FM stations shall operate with a main studio in the station's principal community which it is licensed to serve. Section 73.1130 generally requires more than 50% of an FM station's non-network programs to originate from the station's main studio.

[8a] The "B cut-off" date was March 12, 1982.

telephone line, but testified that if necessary LRI would use a dedicated line (Tr. 661). He projected the total cost of establishing the auxiliary studio at $10,000.00 (Tr. 664).

19. Subsequently, after Van Sickle had referred to a document he had kept at his home, he returned to Washington and testified that he had originally met in Tulsa, Oklahoma on October 19, 1982 with Mr. Curt Lutz, an equipment salesman for Harris Broadcast Corporation. Also present at the meeting was an engineer, Mike Moore. At the meeting, it was determined that the applicant would use a microwave system for the Luling studio. There was no discussion concerning what origination equipment would be used, although there was a general discussion of such equipment. Van Sickle testified that Lutz and Moore reviewed the equipment and he accepted their recommendation to use an STL unit. LRI Ex. 11 constituted the document prepared at the October 19, 1982 meeting (Tr. 1086 through 1088). Van Sickle testified that he had been confused when he initially responded that the auxiliary studio in Luling would be linked to the Lockhart main studio by a telephone line (Tr. 1093). He also testified that the cost figure for an auxiliary studio was projected at $15,000 as shown in Ex. 11, rather than the $10,000 to which he had first referred (Tr. 1101).

20. The distance from Lockhart to Luling is fourteen miles. The driving time between the two communities is fifteen minutes. Lockhart and Luling are served by bus service. Buses leave Lockhart for Luling at 1:35 p.m. and 7:45 p.m. Buses depart Luling for Lockhart at 10:45 a.m. and 7:55 p.m. The bus service is on a daily basis (LRI Ex. 7).

Contingent Comparative (Issue 4)

Caldwell Broadcasting Corporation

21. Caldwell is a corporation formed under the law of the state of Texas (Caldwell Ex. 1). The applicant's owners consist of a corporation (Mediatex Broadcasting Corporation) (MBC), which owns 60 percent of Caldwell's shares, and two individual shareholders, who owns the remaining 40 percent. *Id.* These individuals, and the other officers and directors of Caldwell, are (*ibid.*):

Rene Barsalou	—	President and Treasurer
Robert F. Botik	—	Vice President and 30% shareholder
Michael R. Levy	—	Vice President, Secretary and Director
Harry Gerhart	—	Assistant Secretary
Rene Campos	—	10% shareholder

MBC is, in turn, the wholly owned subsidiary of Mediatex Communications Corporation (MCC) (Caldwell Ex. 1). Michael R. Levy is sole Director and President of both MBC and MCC (Caldwell Ex. 6). He is also the

owner of 95.3 percent of the shares of MCC. *Id.* Another Caldwell principal, Harry C. Gerhart, is a 1.2 percent shareholder in MCC (Caldwell Ex. 5).

22. Caldwell was incorporated on April 17, 1981. On April 20, 1981, the corporation issued 1,000 shares of common stock, $.10 par value to MBC. On March 10, 1982, an additional 1,000 shares of common stock was issued to MBC (200 shares), Botik (600 shares), and Campos (200 shares). Neither Botik nor Campos made payment in consideration of the issuances of the stock. MCC paid for the stock issued to Botik and Campos. Payment was effected by means of forgiveness of a debt (*i.e.*, the forgiveness by MCC of indebtedness owed it by Caldwell for expenditures prior to March 10, 1982 (Caldwell Ex. 10).[8b] Botik testified that he held 600 shares of Caldwell stock, but that he had not paid for the shares and that there was no present agreement with Caldwell for the acquisition of those shares (Tr. 292). He recalled an earlier meeting with Gerhart where they discussed his either paying for the stock or receiving it as a gift (Tr. 328). At a February 12, 1983 meeting at Caldwell's Austin law firm, payment provisions for the stock were discussed. Botik testified that, as a result of the meeting, he understood that he had no obligation to pay for the Caldwell stock (Tr. 300-301). Campos testified that prior to the February 12, 1983 meeting at which he was present, he understood, based upon a prior meeting with Gerhart, that there was a possibility that he might have to purchase the stock (Tr. 369-386). At the February 12, 1983 meeting, Gerhart told him that for bookkeeping purposes it was easier for MCC to purchase the stock in Campos' name (Tr. 369). Neither Campos nor Botik has an obligation to contribute funds to Caldwell or is obligated as a guarantor on any loan to Caldwell (Tr. 330; 394; Central Ex. 10).[9] Both Campos and Botik received their stock certificates at the February 12, 1983 meeting (Tr. 371). Neither has attended any annual meeting of shareholders (Tr. 356, 372). Botik and Campos are Caldwell's proposed integrated stockholders.

23. On March 6, 1982, Messrs. Botik and Campos entered into an agreement with Caldwell and Mediatex Broadcasting Corporation (Central Ex. 9). Paragraph 6 thereof provides that five years after Caldwell receives program test authority from the Commission, Caldwell:

[8b] According to Gerhart, on March 10, 1982 both he and Levy, the sole director and "chief executive officer" of Caldwell agreed, for and on behalf of Caldwell, to accept such consideration in return for the 1000 shares of stock issued that day (Caldwell Ex. 10).

[9] Caldwell proposes to rely on a $1,000,000 line of credit from Texas Commerce Bank, formerly known as the Capital National Bank, in order to meet its costs of construction and initial operations. Botik and Campos did not participate in the arrangements for the loan. The bank letter dated March 18, 1981, requires the guaranty of MCC and Levy (Central Ex. 10; Tr. 329-331).

> shall have the option for thirty (30) days thereafter to purchase all of the outstanding shares of stock held by each Shareholder, except for the stock that is owned by Mediatex Broadcasting Corporation or any successor thereto . . . and the Shareholders owning such stock shall be obligated to sell the Purchase Shares to the Company.

24. MCC owns all of the stock of Texas Monthly, Inc., whose principal publication is "Texas Monthly." "Texas Monthly" is a monthly magazine whose editorial and business offices are in Austin, Texas, a community within the predicted 70 dBu contour of Caldwell's proposed station (Stipulation 2, p. 1). The magazine is classified a "regional magazine" that is geared to the interests of people within the state of Texas. *Id.* In addition to its regular editorial matter, "Texas Monthly," each month, carries an opinion piece devoted to a matter of concern to Texans. *Ibid.* "Texas Monthly" has a publisher's rate base of 280,000 copies each month (Stipulation 2, p. 1). MCC estimates that, on the average, 4.5 persons read each issue, giving it a total readership of 1.26 million persons. *Id.*

25. In the fall of 1982, MCC undertook a study of its paid circulation in central Texas. It was determined that within the predicted 60 dBu contour, 22,800 subscription copies are sold and another 7,000 are purchased at newstands, supermarkets, etc. (Stipulation 2, p. 1). As for Luling and Lockhart, there are 101 subscribers in the former and 144 subscribers in the latter, while 2 copies are purchased monthly in the former and 27 in the latter. *Id.* MCC has estimated that 4.1 individuals read each issue sold in central Texas (Stipulation 2, p. 1). Thus, "Texas Monthly's" readership within the predicted 60 dBu contour is 122,180. *Id.* In the case of Luling, the readership is estimated at 412. As for Lockhart, that estimate is 590.

26. Another wholly owned entity of MCC is California Magazine, Inc. (CMI) (Caldwell Ex. 5, p. 1). CMI is the publisher of "California" magazine. *Id.* at p. 2. "California" is, like "Texas Monthly," a regional monthly magazine, oriented to matters affecting the residents of the state of California (Stipulation 2, p. 2). The publication has a rate base of 250,000 and an estimated monthly readership of 1 million. *Id.*

27. A third corporate entity owned by MCC is Texas Monthly Press, Inc. (TMP). TMP publishes books written by Texans or about Texas, and markets them primarily in Texas (Stipulation 2, p. 2). In the fall of 1982, TMP published 11 books, selling about 80 percent of the 7,000 copies of each book put out. *Id.* About 10 percent of the sales took place in central Texas. *Ibid.*

28. Two principals of the applicant — Harry C. Gerhart (Assistant Secretary of CBC and 1.2 percent owner of MCC) and Greg Curtis (principal of MCC) — own shares of A. H. Belo Corporation (Belo). Belo is a publicly held venture that is a licensee of radio and television stations (Stipulation 2, p. 2). Taken together, Messrs. Gerhart and Curtis own .008 percent of Belo. *Id.* at p. 2-3.

29. Botik proposes to devote at least 40 hours to the station as Vice President of Operations and Director of Programming. Botik will be involved in general policy decisions such as the overall development and growth of the radio station, and will have particular day-to-day responsibility for programming matters. Botik is currently President of Botik Broadcast Services which provides broadcasters with custom-produced formats for automated stations, as well as consultation in programming, sales and station management. If Caldwell receives a construction permit, Botik intends to retain his interest in that company at a reduced level so that he can meet his forty-hour per week commitment (Caldwell Ex. 2; Tr. 288-289). He is not presently providing any consulting services to stations located within Caldwell's 1 mV/m contour (Tr. 287-288, 315). Botik has a consulting agreement with Mediatex Broadcasting Corporation to assist in matters relating to the Caldwell application (Tr. 307). His compensation as consultant is a retainer of $500 per month, which includes the first ten hours and $40 per hour thereafter (Tr. 312).

30. From September 1962 to February 1966, Botik was an announcer at Station KXOL-AM-FM, licensed to Pioneer Broadcasting Company, Fort Worth, Texas. In 1966 he was promoted within the Company and moved to Station KNOW at Austin. Between 1967 and 1971 he served as Music Director and then Program Director, responsible for all Station KNOW programming. From 1971 to 1976, Botik was an account executive at Station KNOW responsible for the selling of advertising. In June 1976 he was promoted to General Manager of the licensee's newly acquired Station KRMH-FM at San Marcos, Texas. From June 1976 to June 1979, Botik was responsible for the daily management of that station and was also its local and national sales manager. In September 1978 he was given the additional duties of General Manager and Sales Manager of Station KNOW. Botik terminated his employment with Pioneer Broadcasting Company to form Botik Broadcast Services in June 1979 (Caldwell Ex. 2).

31. Between 1971 and 1979, Botik resided in Oak Hill, Texas, a community within Caldwell's proposed 3.16 mV/m contour (Caldwell Ex. 2). Botik has for the last three years, and proposes to continue to reside in Travis County, Texas, which is about 40 to 45 miles and a 40 to 50 minute commute from Luling. Botik's present residence is also within the station's proposed 3.16 mV/m contour (Caldwell Ex. 2; Tr. 286). Botik does not claim any civic involvement in Luling or the proposed service area (Tr. 293).

32. Campos, a Hispanic American, is proposed as the station's full-time General Manager/Sales Manager. In this capacity, Campos will devote at least forty hours per week to the day-to-day supervision of the radio station and its sales and technical staff. He will work closely with Botik who, as Vice President of Operations, will provide advice and

consultation. Botik will have the decision making responsibility for programming matters. All department heads with the exception of the Programming Director will report directly to Campos who, in turn, will report to Botik and the President of the corporation on matters of overall policy. Questions of hiring and firing at the station would be Campos' to resolve except for matters concerning personnel in the programming department. In that area, he would defer to Botik who had three years of General Manager experience and who could assist Campos in addressing problems for which he had no answers (Caldwell Ex. 3; Tr. 374, 390).

33. From June 1976 to February 1980, Campos was an account executive for Station KNOW at Austin, Texas. His duties at that station were to sell commercial air time and to service specific clients. From March 1980 to July 1980 he was an account executive at Stations KLBJ-AM-FM, Austin, Texas. His duties at that facility were the same as those at Station KNOW. From August 1980 to December of 1981, Campos was working at at Station KCSW at Austin, where he again served as an account executive. From January 1982 to May 1982 he served as an account executive at Station KEYI-FM at San Marcos, Texas and from June 1982 to November 1982 he was employed as Sales Manager at that facility. He also became the supervisor of all station sales and sales persons. From December 1982 to the present, he has been Sales Manager of Station KNOW and KEYI-FM (Caldwell Ex. 3).

34. Campos is currently a resident of Austin, Texas, a community which is within the 3.16 mV/m contour of Caldwell's station. He has lived in Austin most of his life and has resided at his present address for the past two years (Caldwell Ex. 3). He has made no commitment to move his residence to Luling. In Austin, Campos was involved, from 1976 to 1979, with the Greater South Austin Area Kiwanis. Campos served as President of the South Austin Area Kiwanis Club during that period. In either 1979 or 1980, he was President of the PTA at the school his daughter attended (Tr. 382). Campos became the President and Publicity Director of the Austin Aqua Fest in December 1982, a celebration put on by the Chamber of Commerce every year during the summer. These civic positions are or were held within the proposed station's 1.0 mV/m contour (Caldwell Ex. 3; Tr. 382-383).

35. Caldwell proposes the installation of stand-by power. Specifically, the applicant will install an auxiliary generator. This equipment will be used in the event of emergency conditions or whenever there is a temporary loss of normal utility service (Caldwell Ex. 7).[9a]

[9a] Central and NTI also propose to acquire, install and operate auxiliary power equipment (Central Ex. 1, p. 9; NTI Ex. 6). LRI has not proposed such equipment.

New Thinking, Inc.

36. NTI is a Texas corporation with three stockholders — J. David Bamberger (55%), Lyndell Mark Grubbs (22.5%), and Nancy Grubbs (22.5%). These individuals are all officers of the corporation and, with the exception of Mrs. Grubbs, each is a director. David K. Bamberger is also an officer of the corporation and a director. He holds no NTI stock (NTI Ex. 1). Mr. and Mrs. Grubbs propose to be integrated into the station's operation. No NTI principal has any interest in an entity involved in the mass media of communications (NTI Ex. 2).

37. Mark Grubbs will be the General Manager of the proposed facility (NTI Ex. 3, p. 1). He will be employed at the radio station on a full-time basis (NTI Ex. 5, p. 3). As General Manager, Mr. Grubbs will be in charge of the day-to-day operations of the station (NTI Ex. 3, p. 1).

38. Mr. Grubbs has held a number of sales positions (Tr. 416). Mr. Grubbs first entered the broadcast business in 1965, serving as an account executive for Station KVRO(FM), Stillwater, Oklahoma (NTI Ex. 5, p. 1). In June of 1966, he joined the staff of Station KLOR-FM, Ponca City, Oklahoma, where he was employed as an account executive. *Id.* at p. 2. After a two month period with the station, Mr. Grubbs moved to Corpus Christi, Texas to join Station KEYS(AM). *Id.* At the Corpus Christi station, he spent two and one-half years as an account executive. *Ibid.* Mr. Grubbs then moved to New Orleans, Louisiana for employment at Station WTIX(AM). *Ibid.* In 1969, Mr. Grubbs moved to San Antonio to join the sales staff of Stations KTSA(AM) and KTFM(FM) (NTI Ex. 5, p. 2). For ten years he was employed there as an account executive. *Id.* In 1979, the licensee promoted Mr. Grubbs to the post of sales manager of Station KTFM(FM), a post he continues to hold. *Ibid.* Mr. Grubbs proposes to terminate his employment at the radio station in order to accept the General Manager spot at NTI's station (*Id.* at p. 3).

39. Nancy Grubbs will also be employed at the radio station on a full-time basis. Her principal responsibility at the broadcast facility will be to serve as the station's Business Manager (NTI Ex. 3). In that capacity, she will manage all of the commercial and financial operations of the radio station and its licensee. *Id.* Among her managerial tasks will be the supervision of the finance, accounting, bookkeeping, and personnel functions. *Ibid.* In addition to her business duties, Ms. Grubbs will direct the station's efforts to alert the community to its participation in civic affairs and to learn what the community's needs and interests are. *Ibid.* In the event of a grant of NTI's application, Ms. Grubbs will terminate her employment as Station Manager for Southwest Airlines at the San Antonio airport in order to meet her commitment to NTI (NTI Ex. 4, p. 3).

40. Mr. and Mrs. Grubbs have resided at 17003 Turkey Point Road, San Antonio, Texas since March, 1976. From March, 1970 to March, 1976

they resided at 4110 Desert View, San Antonio, Texas (NTI Exs. 4 and 5). In the event of a grant, Mr. and Mrs. Grubbs will move to Luling (NTI Exs. 4, 5). San Antonio is approximately 55 miles from Luling (Tr. 446). Both these residences are within NTI's proposed 1 mV/m contour. NTI's 1 mV/m signal will cover 16.9 percent of the area of San Antonio, Texas (NTI Ex. 10A).

41. Although not a member, Mr. Grubbs has assisted a number of San Antonio organizations in planning activities and fund raising drives (Tr. 443). These organizations include Muscular Dystrophy Association, 1976-1981; Alamo Heights Optimist Club, 1982; San Antonio Park Foundation, 1981-1982; Multiple Sclerosis Society, 1981-1982; Texas Musicians Association, 1982; Telethon Navadanio, 1981-1982; Lite Fun Run, 1979-1982; Miller National Collegiate Tennis Championship, 1982; Ramblin Raft Race, 1980; United San Antonio, 1982; San Antonio Northside Chamber of Commerce, 1982; San Antonio Drug Awareness Center, 1982; Latin American Theatrical Association, 1981; San Antonio Parks and Recreation Department, 1981-1982; and Oblate College, 1982 (NTI Ex. 5, p. 1-2). All the organizations were based in San Antonio, which is largely outside NTI's 1 mV/m contour (Tr. 532-536; NTI Ex. 10A). While Mr. Grubbs' job description at station KTFM(FM) (sales manager since 1979) did not require his participation, the station benefitted from his involvement (Tr. 445-446). Mr. Grubbs has never had any involvement in Luling activities (Tr. 445-446).

42. Ms. Grubbs has been involved in work related community service activities in San Antonio. From 1980 to 1982 she coordinated the South Texas Blood Bank drive for Southwest Airline employees. She was also the Chairperson, from 1980 to 1983, of the San Antonio United Funds' contribution efforts at Southwest Airlines (NTI Ex. 4, p. 2; Tr. 548-551). Mrs. Grubbs has also volunteered time at St. Mary's Hall where her daughter attends school (Tr. 552). No evidence has been offered showing that any of these San Antonio based activities are within the NTI 1 mV/m contour.

Lockhart Radio Associates

43. Lockhart Radio Associates is a Texas limited partnership of which Lockhart Radio, Inc., a Texas corporation is the general partner of the partnership. The officers, directors and stockholders of Lockhart Radio Associates are as follows:

Names	*Office*	*Shares Held*	*Percent of Shares Held*
James W. Van Sickle III	President/ Chairman/ Director	1247.25	52.5
Mary Van Sickle	Secretary/ Treasurer/	0	0
Mitchell Leigh Potash	Vice Pres./	772.25	32.5
Martha Elizabeth Martinez		355.50	15

Neither LRI or any of its principals has ownership interests in any medium of mass communications (LRI Ex. 4).

44. James W. Van Sickle, III, Owner of 52.5% of the voting stock of LRI will serve as the station's general manager. Mr. Van Sickle will devote his full-time (40 or more hours per week) and effort to that position. Mr. Van Sickle will move to Lockhart, Texas, upon a grant of the application of Lockhart Radio Associates (LRI Ex. 3).

45. Mr. Van Sickle was born in Houston, Texas. From 1964 through 1966, he was employed by WBAP-TV (now KXAS-TV) in Fort Worth as a field reporter. From 1966 through 1969, he worked in the retail advertising sales department at the Fort Work Press (LRI Ex. 2(a). In 1969, Mr. Van Sickle joined KFJZ-AM, Dallas-Forth Worth as an account executive. From 1976 to 1980 he served as local sales manager. From 1980 to 1982, he worked as a management consultant for TM Programming, Inc. in Dallas. In October 1981, he was promoted to general sales manager (LRI Ex. 2(a)). Since the spring of 1982, Mr. Van Sickle has been employed by Mid-America Media, Inc., licensee of KBEZ-FM located at Tulsa, Oklahoma as vice president and general manager (LRI Ex. 2(a)).

46. Martha Elizabeth Martinez, owner of 15% of the voting stock of LRI, will serve as the station's news and program public affairs announcer/producer. Ms. Martinez will devote her full-time (40 or more hours per week) to that position. Ms. Martinez will move to Lockhart, Texas, upon a grant of the application of Lockhart Radio Associates (LRI Ex. 2(b)).

47. Ms. Martinez was born in San Antonio, Texas. From October 1973 to June 1976, Ms. Martinez was employed by KEXL-FM in San Antonio as music director. She also worked a 10 to 2 nightly air shift period. From August 1976 to September 1977, she worked at KITE-AM in San Antonio as news anchor and reporter. Subsequently, Ms. Martinez became employed by KFJZ-AM, Fort Worth as morning and afternoon news anchor and reporter. She held this position until August 1980, when she became public affairs director, reporter and afternoon news anchor at KNUS-FM in Dallas (LRI Ex. 2(b)). From November 1980 through the date of the hearing, Ms. Martinez has been employed by KMGC-FM in

Dallas as sports director, news anchor and reporter. At KMGC-FM, she hosts discovery, public affairs features and Sunday Magazine programs. She has been involved in the production of a 60-second spot news feature called "Inside Look" and has assisted in public relations and promotions (LRI Ex. 2(b)).

48. Mitchell Potash, owner of 32.5% of the voting stock of LRI will serve as the station's full-time sales manager. Mr. Potash will devote his full-time (40 hours or more per week) to that position. Mr. Potash will move to Lockhart, Texas, upon a grant of the application of Lockhart Radio Associates (LRI Ex. 2(c)).

49. Mr. Potash was born in Buffalo, New York. From 1976 to 1977, Mr. Potash was a production assistant with Selm City Recording Studios in Los Angeles. Since 1977, he has been the director of broadcast operations for the Texas Rangers Baseball Network, presently a division of Texas Rangers Baseball Club. He is responsible for coordinating radio and television transmissions and production facilities for broadcast. He is also involved in the sale of radio and television time to advertisers and is responsible for developing and implementing merchandising and promotional programs for local and national sponsors (LRI Ex. 2(c)). Mr. Potash is a member of the American Broadcast Executives of Texas (LRI Ex. 2(c)).

Central Texas FM Broadcasting, Inc.

50. Central is a Texas chartered corporation (Central Ex. 1, p. 1). It is authorized to issue 10,000 shares of stock and has heretofore sold 1,000 shares to its principals. *Id.* The officers, directors, and shareholders of Central are:

Rudy Ruiz	—	President, Director and 5% shareholder
Gonzalo Barrientos, Jr.	—	Vice President, Director, and 5% shareholder
J. Livingston Kosberg	—	Treasurer, Director, and 20% shareholder
Robert Caplan	—	Secretary, Director, and 10% shareholder
Edna Ramon	—	Director and 5% shareholder
Hector De Leon	—	Director and 4% shareholder
Phillip Warner	—	Director and 5% shareholder
Charles Brink	—	Director and 10% shareholder
Billy Goldberg	—	Director and 3% shareholder
Booker Morris, III	—	Director and 5% shareholder
John Peavy	—	5% shareholder

Andelisio Lopez	—	4% shareholder
Samuel De Leon	—	4% shareholder
Mark A. Goldberg	—	15% shareholder

51. Phillip Warner is Editor-In-Chief of the *Houston Chronicle*, an officer of the Houston Chronicle Publishing Co., and a Trustee of the charitable foundation that controls the Houston Chronicle Publishing Co. (Central Ex. 1). The *Houston Chronicle* is a newspaper published on a daily basis in Houston, Texas. The circulation of the *Houston Chronicle* extends into the predicted 1 mV/m contour of Central's station. Central has estimated that the daily circulation figure is 1,612, the Saturday circulation figure is 1,443, and the Sunday figure is 2,924 (Stipulation 1).

52. Channel 20, Inc. owns 51% of Channel 20 Enterprises, a joint venture which is the licensee of Station KTXH at Houston, Texas. At the "B" cut-off date in this proceeding, J. Livingston Kosberg owned 14% of Channel 20, Inc., and was a director and Vice President. Robert Caplan owned 5.06% and was a director and Secretary/Treasurer. Channel 21, Inc. is a television licensee at Fort Worth, Texas. On the "B" cut-off date in this proceeding, J. Livingston Kosberg owned 14.025% of Channel 21, Inc. and was a director and Vice President. Caplan owned 5.0% and was a director and Assistant Secretary. Fort Worth is approximately 205 air miles from Luling, Texas (Stipulation 1).

53. Texas Subscription Television of Fort Worth, Ltd. has a 35% interest in a joint venture named National Subscription Television of Fort Worth which is the STV franchisee using Channel 21 at Fort Worth. Texas Subscription Television of Fort Worth, Inc. is the corporate channel partner of Texas Subscription Television of Fort Worth, Ltd., with a 1% interest in the partnership; the limited partners have the remaining 99%. Caplan has a 5% limited partnership interest in Texas Subscription Television of Fort Worth, Ltd. and is a 5% shareholder, Secretary/Treasurer and a director of Texas Subscription Television of Fort Worth, Inc. He thus has a 1.75% interest in National Subscription Television of Fort Worth. Kosberg has a 14% limited partnership interest in Texas Subscription Television of Fort Worth, Ltd. and is a 14% shareholder, Vice President and director of Texas Subscription Television of Fort Worth, Inc. He thus has a 4.9% interest in National Subscription Television of Fort Worth. He also serves on a seven-person management committee of Texas Subscription Television of Fort Worth (Central Ex. 1). Houston is approximately 130 air miles from Luling, Texas (Stipulation 1).

54. Kosberg owns less than 1% limited partnership interest in Westland CATV, Ltd. and a 1.5% limited partnership interest held in trust for three persons. Under the partnership agreement, limited partners have no rights, power or authority to take part in the management and control of

the limited partnership's business or to bind the limited partners. Westland CATV, Ltd.'s cable television service area, prior to the recent sale of part of the system and at the "B" cut-off date, was to the south of downtown Houston, including areas within and without the city limits of Houston. The system passed approximately 15,000 homes. (Central Ex. 1; Stipulation 1).

55. Channel 20 Enterprises is a 50% shareholder of Houston STV Company which has an option to become the STV franchisee using Channel 20 at Houston, Texas. Through his 5.06% interest in Channel 20, Inc., Caplan has a 1.29% interest in Houston STV Company and serves as Assistant Secretary and director. Through his 14% shareholder interest in Channel 20, Inc., Kosberg has a 3.5% interest in Houston STV Company and serves as Vice President and a director (Central Ex. 1).[9b]

56. Central's integration plan involves the employment of six of its principals. These individuals are: Rudy Ruiz, Booker Morris, III, Edna Ramon, Samuel De Leon, Hector De Leon, and Mark A. Goldberg (Central Ex. 1, p. 8-9).

57. Rudy Ruiz, an Hispanic American, is proposed by Central as the General Manager of the broadcast station (Central Ex. 2). Ruiz will be responsible for the general supervision of the department heads handling public affairs, business, and sales matters, as well as the station manager (Tr. 834-835). It is intended that Ruiz will spend at least 40 hours per week in the employ of the station (Central Ex. 2, p. 2). Ruiz has no prior broadcast experience (Central Ex. 2, p. 1-2).

58. From January, 1975 to October, 1980 Ruiz was Director of Community Development for Luling. In that capacity, he was in charge of planning, community development, parks, streets, water and sewers. He was also responsible for obtaining numerous grants to fund Luling city programs. Ruiz received a plaque from the city of Luling in recognition of his contributions as Community Development Director. In 1980, Ruiz was also named as an Outstanding Young Man of America in recognition of his performance (Central Ex. 2). From October 1980 to the present, Ruiz has been the owner of Community Development Management, located in Lockhart, Texas (Tr. 798). That venture, which employs two individuals, is involved in consulting activities for localities in Texas (Tr. 799, 814-816). In the event of a grant of Central's application, Ruiz will attempt to sell the business. If he is unable to do so, Ruiz will find someone to assume any existing contracts and give his business to his employees if they are unwilling to buy it (Tr. 819-820).

[9b] Kosberg also owns 67 of the 1000 authorized and issued shares of Miami STV, Inc., and is a vice president and director of the corporation; Caplan owns 24 shares of Miami STV and is Secretary and Treasurer. Miami STV is the permittee of WBFS-TV, Miami, Florida (See *Order*, FCC 84M-2377, released May 21, 1984).

59. Ruiz has resided in Lockhart his entire life except for absences due to his education. Lockhart is within the 3.16 mV/m contour of Central's proposed station (Tr. 722). Ruiz has no plans to move to Luling (Tr. 795). From 1980 to 1982 Ruiz served on the Board of Luling Senior Citizens, Incorporated (Central Ex. 2). From about 1979 to about 1980 he served on the Capital Area Planning Council Rural Services Advisory Committee (Tr. 801). Ruiz also participated as a fundraiser and volunteer for the Caldwell County, Texas Democratic Party for two to three hours each week in the months preceding general election in 1978, 1980, and 1982 (Tr. 802-803).

60. Booker T. Morris, III, who is Black, is Central's proposed full-time Station Manager (Central Ex. 1, p. 9). As Station Manager, Morris will be responsible for the technical end of the station's operation and will supervise the work of the Chief Engineer and the Program Director (Central Ex. 4; Tr. 881, 920). As station manager, Morris will be reporting to Ruiz, the General Manager (Tr. 881). The program director will be in charge of the station's day-to-day programming. He will also supervise the program staff consisting of two full-time news announcers/reporters and four part-time announcers. Morris' sole role will be to insure that the program director is following the overall program policy established by Central (Tr. 881, 884, 889).[10] Central's technical staff will consist of a chief engineer and one part-time engineer (Tr. 884). Morris has no engineering background (Tr. 891). He was unable to provide any details of how he would supervise the chief engineer (Tr. 897-898). Morris has no prior broadcast experience (Tr. 954-955).

61. Morris currently serves as the General Counsel of the Texas Department of Labor and Standards, a position he will resign to join Central (*Order,* FCC 83M-1178, released April 11, 1983). He has had no discussions with the other principals as to the salary he will draw at the radio station (Tr. 940). Morris also engages in a private law practice (Tr. 942). He estimates that the practice encompasses about 10 to 12 hours each week (Tr. 942). Morris states he will continue his law practice only if it does not conflict with his responsibilities at the radio station (Tr. 943).

62. Morris is also a stockholder, officer and director of H&M Jewelers, a company which sells jewelery at retail in Austin. The company deals with independent contractors who sell on a commission basis. The contractors are in charge of their own distribution systems (Tr. 930-931). He typically supervises the independent contractors during hours of 5:00

[10] Central proposes to establish a program committee consisting of each of the integrated owners and one non-integrated owner, Gonzalo Barrientos, Jr. The program committee will establish overall program policy including its format. Once the station is in operation, the program committee will meet only when a change in format is contemplated (Tr. 825, 1031, 1042-1043).

p.m. and 8:00 or 9:00 p.m. He also does so on weekends (Tr. 931). He testified that if Central received a construction permit he would reduce his activities with H&M Jewelers (Tr. 932). He is also involved in a business called McYoung Development which looks for real estate properties to develop. He has actively involved himself in searches for properties. He has traveled, at least on one occasion, to Long Island, New York in pursuit of such property (Tr. 934). He has been involved in previous dealings putting together real estate transactions and conceded that sometimes the hours spent putting together such transactions were considerable (Tr. 934-935). Morris said he would make whatever adjustments are necessary in his business activities to fulfill his commitment to the station (Tr. 966).

63. Morris has resided in Austin, Texas since 1976 (Central Ex. 4, p. 1). He will not move to Luling if the construction permit is granted. *Id.* at p. 2. Rather, he will commute the 60 to 65 miles, or one hour drive time, to Luling (Tr. 944). Morris has had no involvement in local community affairs in Luling (Tr. 916). His involvement in the Metropolitan Methodist AME Church in Austin is limited to attending church when he can (Tr. 916). He has participated in the affairs of the Black Austin Democrats since approximately 1979, which functions only during political campaigns (Tr. 918). Morris is a member of the Austin Black Lawyer's Association and served as secretary from 1981 to early 1983 (Tr. 913).

64. Edna I. Ramon, an Hispanic female, is proposed by Central as its Public Affairs Director (Central Ex. 5). She intends to be a full-time employee of the radio station. *Id.* at p. 2. Her salary at the station has neither been discussed nor determined (Tr. 787). As Public Affairs Director, Ramon will be in charge of ascertainment and public affairs programming (Tr. 770). In the ascertainment area, she plans to go to local civic groups, community leaders, and the general community to ascertain needs and interests, and then develop responsive programming (Tr. 773). Central has proposed two and one-half hours of public affairs programming each week, which will come under her direction. The programming consists of a two-hour weekly program called "Luling Today" and a half-hour program called "Bilingual Focus" (Tr. 774). An Assistant Public Affairs Director, Hector De Leon, will report to her and she, in turn, will report to the General Manager (Tr. 771). Ramon's only broadcast experience consists of her serving in 1975 as a part-time script monitor for a bilingual program at Station KLRN-TV at Austin. In that capacity, she monitored a script to insure that actors followed the script and that any deviations were gramatically correct in both English and Spanish (Central Ex. 5; Tr. 775-776).

65. Ramon is a resident of Austin, Texas, which is within the predicted 70 dBu contour of the station (Tr. 787). Her home is a 45-minute drive from Luling (Tr. 774). She intends to maintain it as her residence, and not

move to Luling, if the application of Central is approved (Tr. 774). Ramon intends to resign as an Assistant Texas Attorney General, her present job, should the construction permit be issued (Tr. 775). In Austin, Ramon has been active in the YMCA for several years. She has served as a committee chairperson, officer, and director of the group. Ramon also served as secretary of the United Way Relations Committee in 1981 (Central Ex. 5, p. 2). She is a dues paying member of three bar associations and plays in a soccer league (Tr. 776-777).

66. Samuel De Leon is Central's proposed full-time news director. De Leon will be responsible for all the station's news programming. De Leon will report to the General Manager (Central Ex. 6, p. 2). From 1976 to the present, De Leon has been the owner and operator of the De Leon Funeral Home, one of three funeral homes in Lockhart, Texas (Central Ex. 6; Tr. 749). De Leon resides at the funeral home and is on call 24 hours a day (Tr. 734-735). De Leon handled approximately 25 funerals during the past year. He estimates it takes approximately two days to provide services between death and burial (Tr. 738, 751). De Leon intends to continue as sole proprietor of the funeral home (Tr. 734). De Leon does not intend to work at the radio station at night since visitation hours are during the evening. However, if on occasion, it was necessary for him to work at night at the radio station, his wife would be available at the funeral home (Tr. 737-738). De Leon will contract out mortuary services to the Austin Mortuary Service if they interfere with his duties at the radio station (Tr. 735). Assuming the radio station is successful, De Leon would hire a funeral director to handle the funeral home business (Tr. 736).

67. De Leon has resided at the funeral home in Lockhart since 1976. De Leon was born in Austin and lived there until 1967. He spent two years in Houston and returned to Austin in late 1975 where he remained until moving to Lockhart in 1976 (Central Ex. 1). De Leon has been a member of Saint Mary's Catholic Church in Lockhart since 1976 (Central Ex. 6). De Leon is on the Church's finance committee and serves as master of ceremonies at the church bazaar (Tr. 740). During 1977 and 1978 he was a fundraiser for the United Fund in Lockhart. During the period 1976 to 1978 he was Secretary for one year of Council #684 of the League of Latin American Citizens (Central Ex. 6).

68. Hector De Leon, an Hispanic American, is proposed for the position of Assistant Public Affairs Director (Central Ex. 8, p. 1, 3). He intends to spend a minimum of 20 hours each week working for the radio station (Tr. 696). These hours may be either in the day-time or evening or on weekends (Tr. 696-697). As Assistant Public Affairs Director, Hector De Leon will aid the Public Affairs Director, Edna Ramon, in carrying out matters related to the radio station's public affairs programming (Tr. 703). Ramon will be responsible for the day-to-day management of public

affairs including hiring and firing of employees assigned to her area (Tr. 704-706). De Leon will not supervise any employees and his responsibilities will be only those delegated to him by Ramon (Tr. 705, 717). Ramon was unable to state what responsibilities she will delegate to De Leon (Tr. 772). In this connection, Ramon had no input into the selection of De Leon as Assistant Public Affairs Director (Tr. 783).

69. Hector De Leon is currently the 90 percent owner of an Austin law firm, De Leon & Boggins (Tr. 712). His normal work week consists of 40 to 60 hours and includes representation of the State Pharmacy Board and practice before the State Board of Insurance (Tr. 697-698). Both agencies conduct their meetings in day-time hours (Tr. 698). In meeting his commitment to Central, Hector De Leon does not propose to terminate his law practice (Tr. 700). In fact, he does not intend to reduce his time commitment to his law practice (Tr. 700). According to Hector De Leon, his law clients will definitely take precedence over his position at the radio station (Tr. 701). As for his commitment to Central, he would rearrange his hours so as to meet it (Tr. 702).

70. Hector De Leon recently stood for election to the City Council of Austin (Tr. 698).[11] The Council meets at 10 a.m. on Thursday and for public hearings which may be during the day or at night (Tr. 698-699). As a city councilman, Hector De Leon would reduce his law firm hours by one-third (Tr. 699). Assuming he was elected and Central received the construction permit, Hector De Leon would spend 40 hours each week at his law firm, 20 hours each week on the City Council, and 20 hours at the radio station (Tr. 701).

71. Hector De Leon is currently a resident of Austin (Tr. 695-696). He does not intend to move to Luling, but will commute the 40 miles, or 45 minutes, to the city of license (Tr. 695). De Leon's civic activities have been as follows:

> Member of the Austin Human Relations Commission from about 1974 to 1976.
>
> President of Walsh-Tarleton Neighborhood Association from 1980 to 1981. Chairman of the Association's School Committee from 1981 to 1982.
>
> Member of the Austin Young Lawyer's Association from about 1977 to 1982.
>
> Member of the Downtown Rotary Club in Austin since about 1978.
>
> Member of the Board of Trustees of Big Brothers and Big Sisters of Austin since January, 1983.
>
> Member of Board of Trustees of the Counseling and Pastoral Care Center of Austin since 1979, served as President of the Board for part of 1981 and all of 1982.
>
> Member of the Board of Trustees of the Growth Assistance Program in Austin since 1981.
>
> Member of the Board of Trustees of the St. Davis Health Care Foundation since January, 1982.

[11] Central has not advised as to whether De Leon was elected or not.

Member of the Travis County Bar Association since 1977; member of the Association's Board of Directors since July, 1982.

Candidate for Austin City Council, 1982.

(Central Ex. 8).

72. Mark A. Goldberg has been named by Central as its Sales Manager (Central Ex. 8, p. 2). He proposes to spend at least 40 hours each week in handling his duties at the station. *Id.* Goldberg has no prior broadcast experience (Central Ex. 7, p. 2). Goldberg's current businesses are Four Corners Imports Co., which he operates out of his house, and two real estate development ventures (Central Ex. 7). Four Corners is almost inactive and Goldberg has no intention of reviving the business (Tr. 990). Goldberg will reduce his involvement in his real estate activities to the extent necessary to fulfill his commitment to the station (Central Ex. 9).

73. Since 1976, Goldberg has resided within the predicted 3.16 mV/m contour of Central's station (Tr. 978, 995). His current residence is just outside the city limits of Austin (Tr. 995). He intends to maintain the residence, and not move to Luling, if the construction permit is granted (Tr. 988). Goldberg's single involvement in Austin civic affairs has been as a dues paying member of the Sierra Club, which he recently joined (Central Ex. 7; Tr. 979).

Conclusions

Section 307(b) Issue

74. Section 307(b) of the Communications Act, as amended, requires the Commission to allocate broadcast facilities so as to provide a "fair, efficient, and equitable distribution of radio service" among the "several States and communities" (47 U.S.C. §307(b)). Where two or more applicants have applied to operate on a single frequency but have specified different communities of license, this mandate in turn requires the Commission to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's proposed community of license for a new transmission service. *WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982); *Kent-Ravenna Broadcasting Co.*, 22 P&F RR 605 (1961).

75. In this case, LRI, the sole Lockhart applicant proposes to serve less people than do the Luling applicants. However, since there are a number of daytime and nighttime services available to the proposed uncommon service areas, the reception advantage of the Luling applicants is not dispositive. Resolution of the Section 307(b) issue therefore turns on whether the two communities in question, Luling and Lockhart, have distinct and differing needs for a transmission service and, if so, which has the greater need for the service proposed.

76. The undisputed facts of record show that Luling and Lockhart are separate communities with separate local governments and governmental services; separate business establishments; and separate civic, social and fraternal organizations. However, while AM broadcast station KCLT is licensed to Lockhart (pop. 7,953), Luling (pop. 5,039) has no existing local broadcast outlet. It is well established that every community of appreciable size has a presumptive need for its own local transmission service. *Kaldor Communications, Inc.*, FCC 84R-26, released April 24, 1984 (Rev. Bd.); *Public Service Broadcasting Of West Jordan, Inc.*, FCC 84R-30, released May 2, 1984 (Rev. Bd.). While Lockhart may have a comparatively greater population, there is no question that Luling is a community of appreciable size. Moreover, the fact that Lockhart is county seat of Caldwell County and that there are more governmental offices in Lockhart than in Luling does not rebut the presumptive need for a first local service. It is concluded that the FM applicants proposing a first local transmission service to Luling are entitled to a dispositive Section 307(b) preference over the applicant proposing to serve Lockhart which already has a daytime-only broadcast station licensed to it. *Kaldor, supra; Public Service, supra; Bic Broadcasting Co.*, 81 FCC 2d 1, 26-28 (Rev. Bd. 1980).

Reciprocal Service Issue

77. The reciprocal service doctrine, first articulated in *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603 (1961) would permit an applicant for another community that proposes primary service to the favored community under Section 307(b) (in this case, Luling) to have full comparative consideration with applicants for the favored community if such applicant meets the requirements of the rules for main studio location and program origination with respect to the favored community or seeks a waiver of these requirements. 44 FCC at 2607-08. The continued efficacy of the doctrine has been put in serious question by the Review Board's statement in *Kaldor, supra,* that "[w]e shall henceforth decline to give any serious consideration to the 'doctrine' in Section 307(b) determinations" (paragraph 10). However, even assuming the doctrine is still viable (see *Public Service, supra,* footnote 7)[12], LRI's attempt to invoke the doctrine must fail.

78. The Presiding Judge's grant of LRI's reciprocal service enlargement request was premised on LRI's submission of an engineering report stating that LRI's 70 dBu contour completely covers the city limits of Luling (see FCC 83M-153, released January 13, 1983). However, at a hearing session held on February 16, 1983, LRI's counsel asserted that a

[12] As noted in *Kaldor, supra,* since *Kent-Ravenna* in 1961, the doctrine has only been discussed in six cases that have reached the Initial Decision stage and in none of those cases has the requested relief been granted.

further engineering study indicated that LRI's 70 dBu contour did not encompass all of Luling. LRI urged that strict compliance with Section 73.315(a) was not required. It argued that it should be permitted to go forward with its requests for waivers of the main studio and program origination requirements if substantial compliance with Section 73.315(a) was demonstrated, citing *Edna Corp.*, 24 RR 479 (1962) (see Tr. 403-411). After hearing the arguments of the parties (Tr. 584-603), the Presiding Judge permitted LRI to go forward with its showing. The Presiding Judge is now persuaded that substantial compliance is not enough and that primary coverage over the entire preferred community is an essential prerequisite before waiver requests can be entertained. In this connection, LRI concedes that its 70 dBu contour encloses only 97.7% of the area within the Luling city limits and 98.7% of the population.[13] In *Kent-Ravenna,* the Commission held that primary service to the entire preferred community is an essential prerequisite. That standard has been consistently followed. See *Radio Greenbriar, Inc.*, 80 FCC 2d 107 (Rev. Bd. 1980); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982); *Kaldor, supra.* No cases involving the reciprocal service doctrine have been cited holding that substantial compliance with this requirement satisfies the intendment of the reciprocal service doctrine. *Edina Corp.*, 45 FCC 303 (Rev. Bd. 1962), cited by LRI, is not to the contrary. The ruling in that case did not concern primary service to the preferred community. *Edina,* which involved an enlargement of issues request, dealt with the rule dealing with business district coverage applicable to AM applicants. Section 73.188(b)(1). The FM service has no such requirement. Compliance with the 5 mV/m signal requirement over the entire community (Section 73.188(b)), which was not an issue in *Edina* or *H&R Electronics Co.*, 20 RR 637 (Examiner 1980), cited in *Edina,* is the only relevant rule. Clearly, Edina must be strictly limited to its facts. No justification exists for extending the holding in *Edina,* which has not been relied on for 22 years, to the entirely different question of principal city coverage. Since LRI fails to provide a minimum field strength of 70 dBu over the entire community of Luling as required by Section 73.315(a), its request for reciprocal service consideration can not be entertained.

79. Further, even if LRI had been able to overcome this technical hurdle, its proposal to provide an auxiliary studio must be rejected. This proposal was made after the "B" cut off date. It therefore, is an

[13] To the extent that Caldwell attempted to demonstrate that LRI's signal strength was less than 70 dBu over an even greater area because of shadowing, Caldwell's reliance upon Tech Note 101 is misplaced. Simply stated, Caldwell failed to make the requisite threshold showing essential for use of Tech Note 101 since it failed to demonstrate that the terrain deviated widely from the average elevation of the 2-10 mile sector. *See* Section 73.313 of the Rules.

impermissible attempt to upgrade LRI's application. *Public Service, supra,* at footnote 6. Finally, LRI has not demonstrated persuasive public interest reason for waiving the main studio and program origination requirements. The main studio rules "are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve and they constitute one of the essential ways (that the Commission has) for ensuring that stations realistically meet their obligation their communities as outlets of self-expression." *FM-TV Main Studio Moves,* 27 FCC 2d 851, 852 (1971). LRI's main studio in Lockhart is 14 miles from Luling. Further, Lockhart is only accessible on a limited basis by public transportation from Luling. See paragraph 20, *supra.* The absence of ready accessibility to the main studio for Luling residents provides a basis for denying LRI's request for a waiver of Section 73.1125. *River Band Broadcasting Co.,* 46 RR 2d 1709 (1980); *Orlando River and Television Broadcasting Corp.,* 18 FCC 2d 465 (1969). LRI's proposal to locate an auxiliary studio in Luling, even if timely made, fails to overcome this barrier to waiver. The Commission has never held that an auxiliary studio is a sufficient substitute for the existence of a main studio. In addition, even if LRI's vague proposal to develop some Luling based programming is credited, it is not the kind of primary service that a first local transmission outlet would be expected to provide. Rather, it is merely a secondary service which any station licensed to one community is expected to provide to other communities within its service area. No basis exists for waiving the program origination requirements of Section 73.1130. In sum, it is concluded that LRI failed to meet the required technical requirements before a reciprocal service request can be entertained. In addition, it has failed to justify a waiver of Sections 73.1125 and 73.1130. Accordingly, LRI is not entitled to comparative consideration with applicants for Luling.

Contingent Comparative Issue[14]

80. The standard comparative issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.,* (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communication.

[14] Since the 307(b) issue is dispositive, no purpose would be served in an extended discussion of LRI's comparative qualifications. Briefly recited, LRI and its principals have no media interests. In addition, LRI proposes and is credited with 100% quantitative integration credit. Thus, if LRI were to be comparatively considered with the Luling applicants, it would be the comparative winner.

Diversification of Mass Media

81. NTI has no media interests. Caldwell and Central's principals have cognizable media interests. Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. In addition, significant managerial positions and less than controlling ownership interests in mass media are considered when held by persons having ownership or significant managerial positions in an applicant. Also, interests in existing mass media are more significant to the degree that they are larger, *i.e.,* go towards complete ownership and control. *Policy Statement,* 1 FCC 2d at 393-5; *Greater Wichita Telecasting, Inc.,* 55 RR 2d 926 (1984).

82. Applying the foregoing principles to the facts in this case, the media interests of Caldwell's principals are of minor significance. MCC, Caldwell's ultimate parent, is the owner of *Texas Monthly* magazine, *California* magazine and a book publishing concern. However, the paid subscriber circulation of *Texas Monthly,* a state-wide magazine, in Luling and Lockhart is extremely small and there is no evidence that the magazine focuses on the Lockhart-Luling area specifically. Moreover, Lockhart and Luling each have weekly newspapers published in their communities and there are a significant number of broadcast stations received within Caldwell's proposed 1 mV/m contour. In addition, *Texas Monthly Press,* MCC's book publishing company, publishes few books and only 10% of the sales of the books are made to Central Texas retail outlets. *California* magazine, also is a regional magazine, is geographically removed and of little significance. Also, two stockholders of MCC own .006% and .002% respectively of A.H. Belo Corporation, parent of Belo Broadcasting Corporation. Since the two stockholders own 2.4% of MCC in the aggregate and are not proposed as integrated owners, the interests are of no decisional import.

83. The media interests held by Central's principals are slightly more significant. Kosberg and Caplan, who together own 30% of Central, own interests in a Houston television station, a Fort Worth television station, STV franchises utilizing the Fort Worth and Houston television stations, a Houston cable television system, and a Miami, Florida television station. In addition, Warner, a 5% stockholder of Central is the Editor-In-Chief of the Houston Chronicle. Warner owns no stock in the company owning the newspaper and there is minimal circulation of the newspaper in the proposed 1 mV/m service area. Admittedly, the interests are small and do not approach control of any of these entities. Also, neither Kosberg or Caplan are proposed to be integrated and the entities are not located in Luling or within the proposed service area. As between NTI and Caldwell,

NTI receives a very slight diversification preference. NTI will be given a slight diversification over Central. Caldwell will be given a very slight diversification preference over Central. Central's media interests are more numerous and more significant. In this connection, Fort Worth is approximately 205 air miles from Luling and Houston is approximately 130 air miles from Luling.

Best Practicable Service

Integration

84. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners - including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated" (*Policy Statement, supra,* at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company,* 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied,* FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement,* 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a non-managerial position. *Bradley, Hand and Triplett,* 89 FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.,* 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.,* 88 FCC 2d 830, 839 (Rev. Bd. 1981).

85. Caldwell seeks integration credit for Robert Botik (30% interest) and Hector Rene Campos (10% interest). However, since neither can be considered a true and actual owner, no integration credit will be awarded. Briefly described, Caldwell is, in effect, a one-man company which has been and will be dominated by its sole financier, Michael R. Levy. Levy owns 95.3% of Mediatex Communications Corporation (MCC). Mediatex Broadcasting Corporation (MBC), MCC's wholly owned subsidiary owns 60% of Caldwell's stock. Levy is sole director of MCC, MBC, and Caldwell. MCC and Levy are solely responsible for the station's financing. Botik and Campos became Caldwell shareholders on March 12, 1982. Gerhart and Levy agreed on that date on behalf of Caldwell, to issue stock to MBC, Botik and Campos in return for MCCs forgiveness of indebtedness owned by Caldwell for expenditures prior to March 10, 1982. Neither Botik or

Campos paid for the stock at the time of its issuance or any subsequent time. Botik and Campos have never even voted their shares and were told for the first time in February 1983 that they were given their shares as a gift 11 months earlier. In addition, neither Botik or Campos has any obligation to contribute funds to Caldwell or is obligated on any loan to Caldwell. In this connection, the $1,000,000 line of credit which Caldwell proposes to rely on for its funding, requires only the guaranty of MCC and Levy. Further, prior to the issuance of their stock Botik and Campos entered into an agreement with MBC giving MBC the right to obtain 100% ownership of Caldwell. Five years after program test authority is received, MBC can require Botik and Campos to sell MBC all their shares in Caldwell. Standing alone, the unexercised option may be of no significance, as contended by Caldwell. However, its timing (prior to the issuance of stock), coupled with the other undisputed facts discussed, *supra* undermines the *bona fides* of Botik's and Campos' claims to be treated as owners.

86. The facts in this case require the same determination reached in *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977). Therein, the Board rejected a mechanical *de jure* examination of a party's interest and, instead, looked to the underlying evidence to find that a proposed integrated principal was entitled to no such credit. *Id.* at 425-426. See also *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978). Here, as in *Henderson*, it is clear that Botik and Campos are fronts for Levy and MBC, his alter ego. The issuance of stock to Botik and Campos was simply a strategm to improve Caldwell's integration proposal. MBC, the absentee owner, has and will bear all financial risks. MBC has dominated and will dominate the applicant and Levy, the sole director of MBC and Caldwell will make all policy decisions. Botik and Campos possess no ownership attributes; they are mere employees of MBC. It is clear that is what the parties intended. Consequently, MBC will be treated as the *de facto* 100% owner of the applicant. To allow Caldwell integration credit for Botik and Campos would "make a mockery of the underlying objective of the integration criterion" *Henderson, supra*, 63 FCC 2d at 426. Contrary to Caldwell's assertion, the fact that Botik and Campos will be involved in the day-to-day operation and management of the proposed station does not support the award of integration credit. Caldwell is merely proposing to operate the station on the basis of absentee ownership with supervision — but not control — delegated to employees' *Berryville, supra*, 70 FCC 2d at 7. Caldwell cites *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1982) and *Las Misiones de Bejar Television Company*, 53 RR 2d 119 (Rev. Bd. 1983) in support of an award of integration credit. However, neither case assists Caldwell. First, both cases concerned minority stockholders and do not apply to the award of 30% integration credit to Botik, who is not a

minority member. Further, while Campos is a minority member, the facts are distinguishable. In *Klein,* the Commission approved the gift of a 5% interest to a trusted former employee. Here, there is no evidence of any prior association with Levy justifying the gift of a 10% interest. In addition, in *Las Misiones,* unlike this case, the minority stockholders were personally liable for their stock. Also, unlike *Klein,* and *Las Misiones* the facts in this case compel the conclusion that Campos, like Botik, can not be regarded as a true and actual owner. Therefore, Caldwell will receive no integration credit.

87. NTI will receive integration credit for the proposed participation of Lyndell Mark Grubbs (22.5%), and Nancy Grubbs (22.5%). Central faults NTI's integration proposal. Its criticism is directed to the pre-incorporation agreement of NTI (Central Ex. 14) whereby J. David Bamberger, a non-integrated stockholder, is obligated to increase his commitment should the Grubbs be unable to meet their capital requirements. Central urges that this agreement raises the possibility that the Grubbs may have a lower percent of ownership than their current 45%. This contention is rejected. Central's contention rests solely on speculation and conjecture. Central offers no evidence that the Grubbs will be unable to meet their 45% capital contribution to NTI. Moreover, the record establishes that the Grubbs will have the necessary funds. The Grubbs have a loan commitment from the First National Bank of San Antonio agreeing to lend them up to $135,000 (NTI Ex. 11). This commitment, alone, is sufficient to meet their joint financial obligation. In addition, the Grubbs have sufficient assets of their own to support their capital requirements (see Tr. 516, 525-526). Caldwell also challenges Mrs. Grubbs' role as business manager. The post of business manager is explicitly recognized in the *Policy Statement* as being a significant policy-making position. The record establishes that duties she will perform are those associated with the position of business manager. She is, therefore, entitled to full integration credit. Mr. and Mrs. Grubbs have lived within NTI's proposed 1 mV/m contour since 1970. However, they have not been involved in Luling activities and no evidence has been offered that their San Antonio based activities are within the NTI 1 mV/m contour. Consequently, NTI receives only slight enhancement credit under the residence and civic participation rubric. In addition, the general threshold for awarding significant credit for female ownership is a controlling interest. *Horne Industries, Inc.,* 94 FCC 2d 815 (Rev. Bd. 1983). Hence, NTI's proposed 22.5% female participation warrants only very slight enhancement credit. NTI is also entitled to enhancement credit for Mr. Grubbs' sales related prior broadcast experience. However, previous broadcast experience is an enhancement factor of "minor significance."

Policy Statement, supra; North Carolina Radio Service, Inc., 52 RR 2d 993 (Rev. Bd. 1982).

88. Central proposes to integrate six of its principals representing 38% of its outstanding shares. NTI and Caldwell attack Central's proposal on the general ground that all of the proposed integrated principals, with the possible exception of Mark Goldberg (15% stockholder), are lacking in knowledge of their proposed duties. However, such lack of knowledge may be ascribed to their lack of prior broadcast experience and provides no basis for rejecting Central's integration proposal. *Family Broadcasting Group*, 93 FCC 2d 771 (Rev. Bd. 1983). Rudy Ruiz (5%), Edna Ramon (5%), Goldberg (15%) and Samuel De Leon (4%) will occupy management positions and no credible evidence has been offered raising doubt about their ability to effectuate their proposals. Caldwell's and NTI's contention that Samuel De Leon will not be able to fulfill his commitment as full-time news director because of his ownership of a funeral home is rejected. The record establishes that his ownership of the funeral home will not interfere with the performance of his duties at the radio station. In this connection, De Leon can contract out mortuary services, if necessary. Hector De Leon's (4%) proposal for part-time (20 hours) integration credit as Assistant Public Affairs Director will not be credited. Hector De Leon will not occupy a management level position. His responsibility will consist solely of assisting the Director of Public Affairs in duties delegated to him. He will supervise no employees. It is clear that one who assists, but does not manage, is deserving of no integration credit. *Family, supra; Bradley, Hand, supra.* Moreover, De Leon's other responsibilities, including his Austin law practice (40-60 hours), which will take priority, and a one and a half hour round trip commute from Austin to Luling, raise serious doubt about his ability to fulfill his part-time proposal even if it were accepted. Booker Morris' (5%) proposal for full-time integration credit as full-time station manager can not be credited. Despite his title, Morris' duties will consist solely of supervising the work of the Chief Engineer and the Program Director. However, Morris has no engineering background. Moreover, the Chief Engineer will be in charge of the technical department including the supervision of a part-time engineer. Morris was unable to provide any details of how he would supervise the chief engineer. It seems clear that Morris will, at the most, merely watch over work others perform, given his limited technical knowledge. This activity does not qualify as a management level role crucial to integration credit. Likewise, the station will have a full-time Program Director to manage the day-to-day programming. The Program Director will supervise the program staff. Morris will not be involved in day-to-day decision making. His sole role is to insure that the program director follows the overall program policy established by Central. Thus,

Morris' position as station manager does not involve management responsibilities and is basically a consultative position. No integration credit will be awarded. *Bradley, Hand, supra; Family, supra.* Central will, therefore, receive 29% full-time quantitative integration credit. Central will receive very slight enhancement credit for its proposed 14% minority participation (Ruiz, Ramon, Samuel De Leon), *Horne, supra.* Ruiz, Ramon, Goldberg and De Leon all reside within station's proposed 1 mV/m contour. All with the exception of Goldberg, have participated in civic affairs to some extent. Only Ruiz has been involved in Luling's civic affairs. Since only 29% of Central's owners can claim residence and civic participation credit; since none live in Luling, the proposed city of license; and since only Ruiz', who holds 5% stock interest, can claim significant civic involvement; Central receives only slight enhancement credit. Finally, Ramon's part-time work as a script monitor in 1975 (described in paragraph 64) is inconsequential and does not warrant broadcast experience enhancement credit.

89. In summary, Caldwell receives no integration credit, NTI receives 45% full-time integration credit plus qualitative enhancement, and Central receives 29% full-time integration credit plus qualitative enhancement. NTI has the superior integration proposal. It is well established that qualitative attributes of participating owners may enhance the value of a integration proposal but cannot overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Moreover, Central's qualitative enhancement do not improve its comparative position *vis a vis* NTI. Overall, NTI receives a slight integration preference over Central and a moderate preference over Caldwell. NTI's advantage would be greater if its integration proposal involved a majority of its stock ownership. See *Policy Statement, supra,* at 395; *Gilbert Group, Inc.*, 50 RR 2d 81, 92 (Rev. Bd. 1981). Central receives a slight integration preference over Caldwell.

Comparative Coverage

90. Caldwell will serve a population of 787,184 in an area of 7371 square miles and NTI and Central will serve a population of 852,520 in an area of 7609 miles.[15] Thus, NTI and Central will serve 65,336 more people than Caldwell. However, during the daytime there are five or more existing aural broadcast services available to the proposed uncommon services areas. At nighttime, the number of existing aural broadcast services in the uncommon areas ranges from three to five or more. NTI and Central will be awarded a slight preference over Caldwell for its service to more people and for its providing greater service to relatively

[15] LRI will serve a population of 678,262 in an area of 6205 square miles. As noted, *supra,* LRI's comparative qualifications are irrelevant since the 307(b) issue is dispositive.

underserved areas at night. *Family, supra; Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 644 (Rev. Bd. 1973); *Radio Jonesboro, Inc.*, 55 RR 2d 991 (Rev. Bd. 1984). NTI, Central and Caldwell also receive slight enhancement credit for their proposals to install an auxiliary source of power.

Final Comparative Evaluation

91. NTI has been given a slight diversification preference over Central and a very slight diversification preference over Caldwell. Caldwell has been given a very slight diversification preference over Central. NTI has been given a slight integration preference over Central and a moderate preference over Caldwell. Central has been awarded a slight integration preference over Caldwell. NTI and Central have been given a slight comparative coverage preference over Caldwell. Since NTI enjoys both diversification and integration preferences, it is the winner over Central. Caldwell is ranked last.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of New Thinking, Inc. IS GRANTED and the applications of Caldwell Broadcasting Corporation, Lockhart Radio Associates, Lockhart Radio, Inc., General Partner and Central Texas FM Broadcasting, Inc. ARE DENIED.[16]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

[16] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Children's Advertising Detector Signal

Commission denied a request to initiate a rulemaking proceeding to require TV broadcast licensees and cable companies to insert an inaudible electronic signal at the beginning and end of all commercial advertising designed for and directed to children. —*Children's Advertising*

85-46

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Petition for Rulemaking Pertaining to a Children's Advertising Detector Signal	RM-4545

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1985; Released: January 31, 1985

BY THE COMMISSION: COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

Introduction

1. On June 20, 1983, a petition for rulemaking pertaining to a children's advertising detector signal was filed by Public Advocates, Inc. (Advocates), and Action for Children's Television (ACT).[1] Briefly stated, petitioners seek issuance of a rule which would allow the exclusion of commercials directed at children. They allege that such a regulation would enable parents, consistent with their affirmative responsibility for the upbringing of their children, to exercise effectively the option of choosing what commercial matter their children are exposed to on television.

Petition For Rulemaking

2. Petitioners contend that by watching numerous hours of television, children are exposed to a multitude of advertising presentations. They assert that these messages mislead and confuse children who are unable to distinguish between fantasy and reality and unable to understand the

[1] By Public Notice No. 5308, issued July 14, 1983, the Commission accepted this petition for rulemaking.

persuasive intent in advertising. Furthermore, commercials allegedly cause: (a) parent-child conflict over the purchase of the advertised product, (b) children to be disappointed and disillusioned in the advertised merchandise, and (c) dental and medical harm from the consumption of heavily sugared food products featured in commercials.

3. With the abolition of the NAB Code,[2] petitioners assert, the Commission can no longer rely on industry self-regulation as the solution to problems associated with television advertising practices directed to children.[3] Accordingly, Advocates and ACT suggest that a regulatory remedy is now necessary and, to that end, propose a rule requiring television broadcast licensees and cable companies to insert an inaudible electronic signal at the beginning and end of all commercial advertising designed for and directed to children. This signal is to activate a reactive device, attached to the television set, which will automatically tune out both the picture and sound during the commercial. When programming resumes, the picture and sound automatically return.

4. Petitioners argue that this proposal does not infringe on broadcasters' and advertisers' First Amendment rights or interfere in the content of children's television advertising. They submit that the requirement of an inaudible signal at the beginning and end of a television commercial does not restrict the amount of time a broadcaster can devote to advertising or control a broadcaster's or advertiser's right to speak. Further, they contend that since the purchase and installation of the reactive device is within the viewer's discretion, the audience's right to receive commercial information is not restricted. Petitioners believe that for these reasons, as well as the fact that broadcasters are required to afford children special protection, the proposal is constitutionally permissible. Advocates and ACT further maintain that enactment of such a proposal would promote marketplace determinism in that parents would be able to decide for themselves what commercials they wish their children to view. This provision also is characterized as an inexpensive form of self-regulation, and in furtherance of the Commission's statutory mandate to regulate broadcasting in the public interest.[4]

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[2] On March 3, 1982, the U.S. District Court for the District of Columbia found that certain provisions of the NAB Code could violate the Sherman Antitrust Act. *United States v. National Association of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982). A consent decree in which NAB agreed to stop enforcing the challenged provisions of the Code was entered on November 23, 1982. *See* 571 Trade Reg. Rep. 70843 (December 6, 1982).

[3] The broadcast industry adopted advertising restrictions regarding children.

[4] Petitioners submitted two supplemental filings to their petition for rulemaking. The first, received on October 3, 1983, consists of a letter from Professor Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School. Professor Tribe contends that the First Amendment poses no constitutional obstacle to the advertising detector signal

Comments

5. All the parties submitting comments in this proceeding opposed the petition for rulemaking.[5] Essentially, they argue that: (a) the proposal has no factual justification and therefore no legal merit; (b) it is an attempt to revive issues that have been thoroughly explored in extensive proceedings before this agency and the Federal Trade Commission (FTC); (c) it would have serious deleterious consequences for children's programming; and (d) it would violate the First Amendment rights of broadcasters and advertisers.

6. Commenters submit that there is no factual or scientific support for petitioners' assertions that advertising designed and directed to children is inherently misleading, causes parent-child conflict, or causes consumption of highly sugared products. They maintain that this lack of evidence has been acknowledged repeatedly by the FCC and FTC, both of which declined to ban the broadcasting of children's television commercials.[6] In fact, both CBS and the American Advertising Federation (AAF) contend that not only has it not been demonstrated that any harm results to children from watching commercials carefully designed for them, but that such advertising may well play a positive role in a child's acquisition of consumer skills. Moreover, AAF submits that guidelines for advertising to children have been clearly established and widely observed.[7] Commenters also note that children watch a great deal more television programming than that designed for or directed to them. Opponents question whether petitioners next will ask the Commission to require that a similar signal be placed on all commercial television advertising during hours that children might be watching.

7. Opponents of the proposal argue that it would destroy the necessary economic foundation of children's television. If parents use the electronic device so that children do not view commercials, advertisers will

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proposal. The second filing, submitted October 11, 1983, lists 20 organizations and 11 individuals who support the rulemaking petition.

[5] Comments were filed by: American Advertising Federation; American Association of Advertising Agencies, Inc.; Association of National Advertisers, Inc.; CBS, Inc.; M&M/Mars; NEP Communications, Inc.; National Association of Broadcasters; and National Cable Television Association, Inc.

[6] The FTC concluded that the record in its proceedings, while containing a voluminous amount of information, did not provide an adequate basis for formulating a supportable and workable rule on children's television advertising. *See FTC Termination of Rule Making Proceeding in the Matter of Children's Advertising,* 46 Fed. Reg. 48710 (October 2, 1981). In the *Children's Television Report and Policy Statement* in Docket No. 19142, 50 FCC 2d (1974), the FCC also declined to eliminate advertising from children's programming.

[7] AAF also asserts that the technology for the proposed advertising deletion device does not exist and, in any event, its use would impose unnecessary hardship and expense on advertisers.

withdraw advertising from children's programming. The National Association of Broadcasters (NAB) submits that a complete ban of children's advertising would result in an approximate $400 million gross revenue loss to broadcasters. It is logical to assume, NAB contends, that petitioners' proposal, while not a total prohibition, would nonetheless cause broadcasters to suffer substantial revenue losses. This, in turn, would inevitably affect the quantity and quality of children's programming adversely. In fact, opponents argue, the effect could be quite devastating. Although broadcasters state that they would attempt to maintain the same level of children's programming and even improve service to the child audience, they submit that their ability to do so would be severely undermined by diminishing advertising revenues. It is argued that this would be particularly true for local stations which cannot "subsidize" particular types of profitless programming.[8]

8. Finally, commenters assert that because an absolute ban on nondeceptive advertising to children would violate the First Amendment,[9] the proposal, which has the same effect, is unconstitutional.[10] Even if the proposal is not construed to bar children's advertising outright, commenters contend that it nonetheless violates First Amendment standards currently applicable to commercial speech. In this regard, opponents point out that commercial speech which concerns a lawful activity and which is not misleading may only be limited if: (1) there is a substantial governmental interest justifying the restriction; (2) the restriction directly advances that interest; and (3) the limitation is no more extensive than necessary to serve that interest.[11] Commenters contend that the proposed restriction on commercial speech has not been shown to serve any substantial state interest, and that the limitation is not narrowly tailored, as required. Accordingly, commenters submit that petitioners' proposal cannot withstand constitutional scrutiny.

Discussion and Conclusions

9. After considering the arguments advanced by petitioners and commenters, we are not convinced that issuance of the requested notice of proposed rulemaking is warranted. First, petitioners' proposal if effective-

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[8] A number of commenters, in particular NEP Communications, Inc., noted that revenues from locally-produced television shows for children barely cover the costs of production.

[9] The United States Supreme Court first held that purely commercial speech was protected by the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[10] NAB submits that the proposal also would violate Section 326 of the Communications Act, which prohibits Commission interference with the right of free speech, because the broadcaster loses effective control over a portion of the broadcasting format.

[11] *Citing Central Hudson Gas & Electric Corp. v. Public Service Commission (Central Hudson)*, 447 U.S. 557, 566 (1980).

ly implemented would almost certainly have a detrimental effect on the amount and quality of children's programming broadcast by commercial television licensees and cable television operators. Under modern conditions the Commission has held sponsorship fosters rather than diminishes the availability of public affairs and cultural broadcast programming.[12] In 1974, the Commission affirmed this conclusion with regard to children's programming.[13] We stated that advertising is the basis for the commercial broadcasting system and that revenues from the sale of commercial time were necessary to provide the financing for the production of programs. We continue to believe that eliminating or significantly reducing the economic base and incentive for children's programs, which is the probable effect of the proposal, is likely to result in the curtailment of broadcasters' and cable operators' efforts to program for the child audience. As we stated in 1984, ignoring the fundamentally commercial nature of the commercial broadcasting system is done at great risk.[14]

10. Moreover, with respect to petitioners' allegations that commercials cause children harm, nothing in the record supports a reversal of our prior decision that children are adequately protected if their special characteristics are recognized when commercials are developed and broadcast. Broadcast licensees have a public interest responsibility to see that the advertising they air for children meets this criterion.[15] Furthermore, parents can exert direct control over the amount and type of their children's television viewing without enactment of the proposal. In addition to commercial television, children also have available to them a substantial amount of commercial-free programming broadcast by public television stations or provided by other delivery systems including particularly cable television systems. Thus, many parents already have the option of having their children view a significant amount of television designed for them without the attendant commercials. As we have diversity in the means of delivery of children's television, we have diversity in the method of financing that programming. We believe that

[12] *Report and Statement of Policy Re: Commission En Banc Programming Inquiry,* 44 FCC 2303 (1960).

[13] *Children's Television Report and Policy Statement* in Docket No. 19142, n.6 *supra.*

[14] *Children's Report and Order* in Docket No. 19142, 96 FCC 2d 634 (1984).

[15] Although the NAB Code is no longer in force, guidance concerning advertising practices in children's programming, such as host selling and appropriate separation of commercial and program material, contained in the Commission's 1974 *Report and Policy Statement* remains viable. *See* n.6 *supra. See also Action for Children's Television v. FCC,* 564 F.2d 458 (D.C. Cir. 1977), in which the Court held that the Commission's decision to provide policy guidelines and not to adopt specific regulations governing advertising and programming practices for children's television was a reasoned exercise of its broad discretion.

this is advantageous to the continuation and growth of children's television offerings.

11. Given, then, the absence of any substantial showing of need for the suggested rule and the potential harm to the availability of children's programming which it might engender, we conclude that implementation of petitioners' proposal is inadvisable as a matter of policy. It should also be borne in mind that children watch a substantial amount of television that is not specifically programmed to meet their needs or interests. If petitioners' proposal is carried to its logical conclusion, the result would be the elimination of all advertising which is the financial basis of commercial television. We decline, therefore, to initiate the requested rulemaking proceeding. In view of this conclusion, we do not find it necessary to reach, and we offer no opinion on, the question of whether constitutional or statutory considerations would present any obstacles to the adoption of the rule sought by petitioners.

12. Accordingly, IT IS ORDERED, That the subject petition for rule making (RM-4545) filed by Public Advocates, Inc. and Action For Children's Television IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Petition for Rulemaking Pertaining to Children's Advertising Detector Signal

I am sensitive to the issues raised by the instant rulemaking request. Nonetheless, I can support the decision to deny the request primarily because I am concerned that an advertising signal detector could substantially undermine the economic foundation (such as it is) of children's programming aired on commercial television. Such programs are in all too short supply now[1], and (contrary to the claims made by the Memorandum Opinion and Order at para. 10) alternatives to commercial television are not yet widely available in the video marketplace. In view of my desire to enhance the availability of programs for children, I am

[1] *See Children's Television Programming and Advertising Practices*, 49 Fed. Reg. 1704 (January 13, 1984), 55 RR 2d 199, 243 (1984) (Dissenting Statement of Commissioner Henry M. Rivera).

reluctant to consider a measure which might be inimical to that goal especially when other means exist to keep children from watching offending commercials, such as turning the television set off. On the other hand, there are limits to how far the Commission can go to accommodate the commercial nature of advertiser-supported television for children. I am, therefore, pleased to note the Commission's recognition in this Order of the continued vitality of restrictions against practices like host selling and intermixture of commercial and programming matter in programs aimed at the children.[2] All things considered, I think the Commission has reached the right conclusion here.

[2] *See Memorandum Opinion and Order* at n. 15. *See generally, Report and Order Revising Commercial Television Licensing Policies,* 49 Fed. Reg. 3358 (August 23, 1984), 56 RR 2d 1005, 1066 at n.22 (Statement of Commissioner Henry M. Rivera Concurring in Part, Dissenting in Part).

Offset Requirements

Both the low power television or television translator facility proposed by an applicant and the existing co-channel station which it must protect are required to employ different frequency offset designations before the application can be processed under the offset standards of the low power television interference rules. *—Citizen TV Corp.*

Television, Low Power Translator

The declaration of an applicant that it will remove a rule violation in its application by taking action in the future to improve the frequency stability of an existing station is not a basis for reinstatement of a low power television or television translator application. *—Citizen TV Corp.*

FCC 85-83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Citizen Television Corporation	File No. BPTTL-81011 6P8
For a Construction Permit for a New Low Power Television Station on Channel 67, Denver, Colorado	
Winchester TV Cable Company	File No. BPTTL-821119TZ
For a Construction Permit for a New Low Power Television Station on Channel 64, Winchester, Virginia	

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1985; Released: February 27, 1985

BY THE COMMISSION:

1. The Commission has under consideration Applications for Review filed by Citizen Television Corporation ("Citizen") and Winchester TV Cable Company ("Winchester"). Both Citizen and Winchester contest actions taken by the Mass Media Bureau staff denying their petitions for reconsideration and returning their above-captioned applications.

2. Citizen submitted its application on January 16, 1981. On September 21, 1982, Citizen amended its application to specify operation on a plus frequency offset designation.[1] Citizen's application was returned on July 1, 1983, because its proposed operation was predicted to cause interference to co-channel television translator station K67AS, Estes Park, Colorado, in violation of interference standards set forth in Section 74.707 of the Commission's Rules, 47 CFR §74.707 (1983).

3. Citizen resubmitted its application on August 1, 1983, and contended in its concurrently filed petition for reconsideration that its amendment specifying the plus frequency offset designation was not taken into account in evaluating the technical sufficiency of the application. The Bureau's letter denying the petition for reconsideration and returning the application stated that to achieve the additional protection afforded by frequency offset operation, both stations in question had to operate on a frequency offset basis and employ different frequency offset designations. Although Citizen's designation of plus frequency offset was recognized, Commission records indicated that K67AS operates without a frequency offset designation. Consequently, the protection standards used when both stations employ offset were not applicable. Citizen's proposed facility was evaluated under the non-offset interference standards, and was predicted to cause interference to K67AS.

4. Winchester submitted its application on November 19, 1982, and proposed to operate on Channel 64 with a zero frequency offset designation. The applicant's engineering statement noted that Channel 64 with a plus frequency offset was allocated to Charlottesville, Virginia in the Television Table of Assignments, Section 73.606 of the Commission's Rules, 47 CFR §73.606 (1983). Winchester proposed to provide co-channel

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[1] Frequency offset operation permits a less restrictive desired-to-undesired interference ratio between co-channel stations, thus allowing a greater number of stations to operate on the same channel. A valid frequency offset relationship between stations is obtained when both stations specify operation on different "frequency offset designations", either plus, minus or zero, and when both stations use transmitters capable of keeping their carrier frequencies within the tolerance levels necessary to sufficiently maintain the offset relationship. Plus and minus offset are defined as those frequencies 10 kHz above and 10 kHz below the nominal visual carrier frequency within a channel, respectively. Zero offset is defined as offset operation on the nominal carrier frequency. The term "non-offset operation" (or "operation without frequency offset") is used when a station does not designate operation with plus, minus or zero offset, and therefore is not required to operate within a tolerance of 1 kHz of the nominal carrier frequency.

television translator W64AO, Charlottesville, Virginia, which does not operate on a frequency offset basis, with the necessary equipment to operate on Channel 64 with plus frequency offset upon grant of Winchester's application. The Bureau returned Winchester's application on December 14, 1983, because its proposed operation was predicted to interfere with the present non-offset operation of W64AO in violation of Section 74.707 of the Commission's Rules.

5. Winchester petitioned for reconsideration and contended that its application should be accepted for filing *nunc pro tunc* because the licensee of W64AO had recently agreed to accept the necessary equipment to operate at plus frequency offset upon grant of Winchester's application. The Bureau denied Winchester's petition on the ground that the Commission's Rules prohibit the authorization of low power television stations that do not meet the required interference protection criteria. Since Winchester's application was predicted to interfere with the present, non-offset operation of W64AO, its application was unacceptable for filing under the low power television interference rules.

6. In its application for review Citizen again argues that its specification of plus frequency offset was not considered in the interference studies which required the return of its application, and that its own interference studies show that no interference would be caused to K67AS. Contrary to Citizen's assertion, its application amendment to reflect its proposed operation with a plus frequency offset designation was incorporated into all engineering studies. However, Citizen's proposed frequency offset operation was insufficient to protect K67AS. Section 74.707(d)(1) of the Commission's Rules specifies the acceptable ratio in dB of field strength of a low power television application to that of an authorized co-channel operation at its protected contour as -45dB without offset carrier frequency operation and -28dB with offset carrier frequency operation. Section 74.707(d)(1)(i) further provides that for frequency offset operation to be used so that the less restrictive –28dB ratio can be applied, both the proposed facility and the existing station must employ different frequency offset designations. Since the licensee of K67AS operates without a frequency offset designation, the more restrictive –45dB ratio must be applied under the rule to protect K67AS from interference. Using this dB ratio, Citizen's proposed facility was properly predicted to cause interference to the signal of K67AS and was correctly returned as unacceptable for filing.

7. Additionally, both Citizen and Winchester maintain that their applications were incorrectly returned because the Bureau neglected to consider a statement by Citizen in its application which promised to eliminate interference to K67AS in the future, and a statement by Winchester in its petition for reconsideration which declared that it had

reached an agreement with the licensee of W64AO whereby the licensee will accept and install plus offset and frequency control equipment.[2] It is said that the Bureau's failure to consider these statements in returning the applications is contrary to the past Commission practice of accepting agreements between applicants and licensees to acquire frequency control equipment for the existing station in order to eliminate present interference.[3]

8. In essence, both applicants argue that their prospective arrangements with authorized stations should obviate the Commission's predicted interference standards and make their applications acceptable for filing. However, consideration of such arrangements in the processing of low power television applications would undermine the "complete and sufficient" application acceptance standard of the service and render nugatory the predicted interference standards which determine the technical acceptability of an application. We have repeatedly indicated that the complete and sufficient standard set forth in Section 73.3564 of the Commission's Rules means that applications must be letter perfect when tendered. *See Low Power Television Report and Order,* 51 RR 2d 476, 501-02 (1982), *recon. granted in part,* 53 RR 2d 1267 (1983); *American Christian Television System, Inc. (Channel 50, Vero Beach, Florida),* 56 RR 2d 1445 (1984); *Kinetications, Inc.,* 56 RR 2d 1402 (1984); *Holston Valley Broadcasting Corporation,* FCC 84-453, released September 28, 1984; *Rochelle C. Salzer et.al.,* 56 RR 2d 1398 (1984); *Katy Communications, Inc.,* FCC 84-536, released November 16, 1984; *Local Service Television, Inc.,* FCC 84-571, released November 30, 1984; *Telecrafter Corporation,* FCC 85-62, released February 12, 1985. Due to the secondary nature of the low power television service and the processing burdens and the concomitant delay in service to the public created by manual study of each application, the low power television rules implemented a predicted interference standard for purposes of application processing. This standard measures the likelihood of interference be-

[2] Winchester incorrectly states that W64AO is authorized to operate with plus frequency offset. As stated earlier, W64AO operates without frequency offset, and is licensed to do so. Channel 64 with plus frequency offset designation is allocated to Charlottesville in the Television Table of Assignments, which relates only to full service television allocations. The unused allocation is irrelevant to the present operation of low power television and television translator stations in the area, and does not indicate that the operation of W64AO with plus frequency offset would not cause interference to some other existing station.

[3] We note that neither Citizen nor Winchester has shown that it had an agreement at any time to provide frequency offset equipment. Citizen offers only an assertion that it will do what is necessary to eliminate interference to K67AS, presumably after its low power television station becomes operational. Winchester claimed in both its petition for reconsideration and its application for review that it had reached agreement with the licensee of W64AO, but has not provided any documentation of the purported agreement.

tween the facility proposed by an application and an authorized station by calculating the amount of overlap, if any, between the predicted coverage of the proposed facility and the predicted contour of the authorized station.[4] If contour overlap occurs, interference to the authorized station by the proposed facility is predicted. Consequently, the application must be returned as defective pursuant to Section 73.3566 of the Commission's Rules[5] and cannot be reinstated *nunc pro tunc* by the resubmission of the application with a correcting amendment. *Kinetications, Inc., supra.*[6] Allowing declarations or agreements which promise future action to relieve present predicted interference to play a decisionally significant role in the technical acceptability of an application would enable a low power television applicant to evade the predicted interference rules and vitiate the complete and sufficient acceptance standard by simply promising to eliminate interference caused to an existing station when its low power television facility is operational. Such a policy would constitute a *de facto* waiver of the acceptance standard for any applicant which made such a declaration or agreement.

9. The evisceration of the complete and sufficient acceptance standard in this manner would interminably delay low power television application processing by making it impossible to predict accurately interference which could be caused by most, if not all, low power television applications, not just the application in question. One application can directly or indirectly affect hundreds of other applications in a daisy chain effect. Each change in information contained in an application or modification of an existing facility requires alterations to the engineering and/or directional antenna data bases and additional computer and staff analyses to determine mutual exclusivity between applications and existing stations. A tentative future modification to an authorized station, if allowed, would result in the acceptance for filing of applications that are patently not in

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[4] The interference standards are set forth in Sections 74.705 and 74.707 of the Commission's Rules, 47 CFR §§74.705, 74.707 (1984). A discussion of the reasons for their adoption is set forth in the *Low Power Television Report and Order*, 51 RR 2d 476 (1982).

[5] Section 73.3566 of the Commission's Rules, 47 CFR §73.3566 (1984), provides in pertinent part, "Applications which are determined to be patently not in accordance with the FCC rules . . . will be considered defective and will not be accepted for filing."

[6] Since September 15, 1983, no new or major change applicant for a low power television or television translator station may resubmit its application unless the applicant is the licensee of an existing translator station and is seeking a frequency change from channels 70–83 to a lower channel or is seeking a frequency change to eliminate interference caused to or received from a newly operational full service television station. This situation is attributable to our application filing freeze and to our subsequent institution of the window filing procedure in the service. *See Order Imposing Freeze*, FCC 83-423, released September 19, 1983; *Low Power Television Service (Filing Windows)*, 57 RR 2d 234, 235-37 (1984).

compliance with the predicted interference standards. Moreover, the tentative future modification of an authorized station would require that two engineering studies be performed for interference prediction, one using the station's present operation and one employing the proposed modification. Alternative studies would then be necessary for every other low power television application that was directly mutually exclusive with that station to gauge the effect of the tentative modification on the acceptability of those applications. This in turn would necessitate the restudy of every application directly mutually exclusive with those applications for the same reason, and so on. As a result, a great number of applications would have to be processed at least twice due to just one tentative modification to an authorized station. This repeated processing would double the processing time for all low power television applications, not just the applications involved.

10. Further, consideration of private agreements would prejudice all other similarly situated applicants. This prejudice would arise in situations where a given application is mutually exclusive with the current operations of two or more authorized stations, or where two or more applications are mutually exclusive with one authorized station. In such cases, both the Commission's staff and other applicants that are mutually exclusive with the application(s) in question and/or the authorized station(s) would have to contend with a bewildering array of possible modifications, since authorized stations could potentially employ one of three different frequency offset designations, make other minor changes in their facilities that would affect the status of every application with which they are or would be mutually exclusive, or even make alternative agreements with different applicants. It would be impossible for applicants to keep abreast of agreements between other mutually exclusive applicants and authorized stations, and financially impractical for them to procure engineering studies to cover every contingency. With approximately 25,000 pending low power television applications, most of which are directly or indirectly mutually exclusive with many others, repeated processing of applications and additional delays in processing are not acceptable and do not promote the public interest in receiving prompt service. Consequently, the Bureau's decision to process Citizen's and Winchester's applications without regard to declarations or purported agreements in those applications which promised future elimination of interference was justified and proper. *See Las Manzanas Television Company,* FCC 84-570, released January 11, 1985.

11. Based on the foregoing, we believe that the Bureau fully considered and properly decided the matter. Consequently, Citizen's and Winchester's applications for review will be denied.

12. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the applications for review filed by Citizen Television Corporation and Winchester TV Cable Company ARE DENIED.

13. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to each applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier Contract With Non-Carrier Customer
COMSAT, Authorized Users
INTELSAT

Second Report and Order readopting the Commission's revised authorized-user policy to allow non-carrier entities greater access to Comsat's INTELSAT transmission facilities.
—*COMSAT*
CC Docket No. 80-170

FCC 84-633

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation	CC Docket No. 80-170

SECOND REPORT AND ORDER

Adopted: December 19, 1984; Released: January 11, 1985

BY THE COMMISSION: COMMISSIONER DAWSON DISSENTING IN PART.

1. On January 13, 1984, the United States Court of Appeals for the District of Columbia Circuit[1] vacated and remanded our August 19, 1982, Report and Order in the above-captioned proceeding.[2] The court directed us, prior to implementing our *Authorized User II* policy, to consider issues under examination in two inquiries then pending before the Commission which the court found to be directly related to the issues in *Authorized User II.* These inquiries are the *Direct Access*[3] and *Earth*

[1] ITT World Communications Inc. v. FCC, 725 F. 2d 732 (D.C. Cir. 1984).

[2] Proposed Modifications of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, 90 FCC 2d 1394 (1982) [hereafter cited as Authorized User II], *revising* Authorized Users and Authorized Entities, 4 FCC 2d 421 (1966), *reconsid. grtd. in part* 6 FCC 2d 593 (1967) [hereinafter cited as *Authorized User I].*

[3] Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982) (Notice of Inquiry in CC Docket No. 82-548).

Station Ownership [4] proceedings. Pursuant to that direction, on April 30, 1984, we released a Further Notice of Proposed Rulemaking in this proceeding,[5] noting that we had subsequently issued a Report and Order in the *Direct Access* [6] proceeding and a Notice of Proposed Rulemaking in the *Earth Station Ownership* [7] proceeding, and requested comment from interested persons upon the impact those actions might have on our proposed *Authorized User II* policy. As we shall discuss more fully below, we have reviewed the pleadings filed in response to our Further Notice of Proposed Rulemaking and have decided to reaffirm our 1982 *Authorized User II* policy.

2. In response to our Further Notice, we received comments and reply comments from thirteen parties. We received comments and replies from the Communications Satellite Corporation (Comsat), the American Telephone and Telegraph Company (AT&T) and four international record carriers (IRCs): ITT World Communications Inc. (ITTWC), MCI International, Inc. (MCII), RCA Global Communications, Inc. (RCAGC) and TRT Telecommunications Corporation (TRT). We also received comments and replies from two U.S. governmental bodies who are interested in international communications policy matters, the United States Department of Defense (DoD) and the National Telecommunications and Information Administration (NTIA) in the Department of Commerce. In addition we received comments from entities who are users of international communications services who either now take service from Comsat or seek authority to do so: Aeronautical Radio, Inc. (ARINC),[8] Dow-Jones and Company, Inc. (Dow-Jones),[9] Uninet, Inc. (Uninet),[10] and the three

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[4] Modification of Policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system, 90 FCC 2d 1458 (1982) (Notice of Inquiry in CC Docket No. 82-540).

[5] FCC 84-151, 98 FCC 2d 158.

[6] 97 FCC 2d 296 (1984) (Report and Order terminating the proceeding).

[7] 97 FCC 2d 444 (1984) (Notice of Proposed Rulemaking). On December 4, 1984, we made the proposed policy final, FCC 84-605, ___ FCC 2d ___, released December 18, 1984.

[8] ARINC is a joint venture of the U.S. air-transport industry organized for the purpose of providing the communications requirements of its member airlines on a not-for-profit basis. Because it is not a common carrier, but a user group, ARINC is not eligible under our 1966 *Authorized User I* policy to take service from Comsat.

[9] Dow-Jones publishes a number of financial publications in the United States, with special regional editions in other parts of the world. Within the United States Dow-Jones uses the U.S. domestic satellite to transmit editorial material from its headquarters to its various printing plants around the country and seeks to make similar use of international satellites.

[10] Uninet provides enhanced services over a "value-added, packet-switched digital communications network" within the United States and, through interconnection with the networks of the IRCs, to several overseas points. Uninet seeks authority to take service directly from Comsat. Since Uninet is an enhanced-service provider and, thus, is a non-carrier under our *Computer II* policy, *see Amendment of Section 64.702 of the*

major U.S. television networks (filing a joint petition), American Broadcasting Company (ABC), Columbia Broadcasting System (CBS) and National Broadcasting Company (NBC).[11] Finally, we received comments from International Relay, Inc. (IRI), an entity which provides certain international end-to-end communications services and whom we have recently licensed to construct and operate earth stations for the provision of INTELSAT Business Service (IBS).[12] The parties' comments are summarized in an appendix attached to this Second Report and Order.[13] Below we summarize: (a) the 1966 *Authorized User I* decision; (b) the 1980 Notice of Proposed Rulemaking; (c) the 1982 Report and Order; (d) the decision of the Court of Appeals; (e) our subsequent orders in the *Direct Access* and *Earth Station Ownership* proceedings; and (f) the Further Notice of Proposed Rulemaking in the *Authorized User II* docket. We thereafter analyze the record and indicate our reasons for readopting the *Authorized User II* policy.

I. Background

A. Authorized User I Decision (1966)

3. In our 1966 *Authorized User I* decision, we had limited Comsat generally to the role of a "common carrier's common carrier" providing

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Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), *reconsideration granted*, 84 FCC 2d 50 (1980), *further reconsideration granted*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied* 51 U.S. L.W. 3826 (U.S. May 16, 1983), it is not eligible under *Authorized User I* to take service from Comsat.

[11] In *Spanish International Network*, 70 FCC 2d 2127 (1978) (hereafter *SIN*), decided prior to our 1982 Report and Order in *Authorized User II*, we allowed customers of international satellite television transmission service, a service provided internationally solely via the INTELSAT satellite system, to take end-to-end service directly from Comsat. The *SIN* decision on appeal was consolidated with our 1982 *Authorized User II* decision. The D.C. Circuit Court of Appeals, in the same opinion vacating and remanding *Authorized User II*, upheld our *SIN* policy. *See ITTWC v. FCC*, 725 F. 2d at 752, n. 48. The networks seek assurance that any general authorized-user policy we adopt as a result of this Second Report and Order similarly allows users to deal directly with Comsat's World Systems Division.

[12] We have authorized IRI to construct and operate earth stations, known as "urban gateway" stations, for use with INTELSAT Business Service, in six cities: Chicago and New York, *International Relay, Inc.*, File Nos. CSG-84-001-P/L and CSG-84-004 P/L, Mimeo 34388, released April 11, 1984, Stamford, Conneticut and Detroit, Michigan, File Nos. CSG-84-025-P/L and CSG-84-026 P/L, Mimeo 5194, released July 9, 1984, and Washington, D.C. and Alexandria, Virginia, File Nos. CSG-84-032 P/L and CSG-84-033 P/L, Mimeo 6800, released September 25, 1984.

[13] MCII and TRT filed their comments three days after the date specified for filing. They included with their comments motions to accept their comments. Inasmuch as no one has been prejudiced by the late filing of these pleadings, and because the views of the carriers will assist us in reaching decision, we shall grant the carriers' motions and accept their pleadings.

satellite circuits to the service carriers for their use in providing service to users. Our 1966 policy had been prompted by Comsat's initiation of international satellite service and requests by a number of entities for designation under the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§701-757 (1976) (Satellite Act), as "authorized users" of Comsat's services.[14] In *Authorized User I* we conclude that, although the Satellite Act allows us to designate anyone as a customer of Comsat, we would limit Comsat's operations on policy grounds. We were concerned that the satellite technology was likely to be so much more efficient than cable technology that Comsat's entry into the retail market would threaten the other international carriers' revenues and significant investment in cable facilities. We, thus, acted to protect them from competition. We did decide, however, that under "unique and exceptional circumstances," we would authorize non-carrier users, including departments of the United States government, to lease satellite circuits directly from Comsat.[15]

B. 1980 Notice of Proposed Rulemaking

4. In 1980 we issued a Notice of Proposed Rulemaking, *Aeronautical Radio, Inc.*, 77 FCC 2d 534, looking into the need to modify our 1966 policy. In that Notice we noted that the international communications market had changed greatly since our 1966 decision. The participants in the market had grown larger and their revenues had sharply increased. As a result, we questioned whether the public-interest considerations on which we had based our *Authorized User I* policy remained valid and concluded that the time had come for a far-ranging reexamination of our decision to restrict direct Comsat public operations. *Id.* at 550-2. We then sought public comment upon our tentative analysis and, specifically, upon a proposal to allow Comsat to provide service directly to the public. Upon receipt of voluminous comment from interested carriers, governmental entities and communications users, we issued the subject 1982 Report and Order.

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[14] Section 305(a)(2) of the Satellite Act, 47 U.S.C. §735(a)(2), provides that Comsat shall "furnish for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic . . ." Section 305(b)(4), 47 U.S.C. §735(b)(4), authorizes Comsat to "contract with authorized users, including the United States Government, for the services of the communications satellite system."

[15] On reconsideration, 6 FCC 2d at 594, we modified our "unique and exceptional circumstances" test with respect to governmental entities to provide that such entities would be authorized to take service directly from Comsat whenever their national-interest requirements could not be met effectively under the carrier's carrier approach.

C. 1982 Report and Order

5. In our 1982 Report and Order we reaffirmed our 1966 holding that the Satellite Act gives us broad discretion to determine the scope of Comsat's operations, that Comsat is not statutorily restricted to the role of a carrier's carrier, and that our 1966 decision so to limit Comsat was a policy decision based upon our perception of conditions in the international communications market at that time. We concluded that we are free to modify our 1966 policy should we find that circumstances have changed so that our restrictive policy no longer served the public interest.

6. Our 1982 Report and Order further noted a number of changes which have occurred in the industry since our prior decision. Our analysis of these changes prompted us to conclude that the public interest is now disserved by artificial restraints and market divisions which deny users the benefit of Comsat's satellite expertise. We thus decided to modify our 1966 policy in two respects. First, we decided to allow non-carrier users to lease what we called "basic satellite transmission capacity" directly from Comsat's World System Division at U.S. earth stations.[16] Second, we found that Comsat is eligible, through a separate common-carrier subsidiary, to seek certification under Section 214 of the Communications Act of 1934, 47 U.S.C. §214 (1976), to provide switched and other end-to-end services directly to customers. We also granted the international carriers discretion to "decomposite" (deaverage)[17] their leased-channel rates by filing separate satellite-only and cable-only rates or to continue to file one composite rate for both types of service. Finally, we indicated our intention in the future to rely more upon competition to determine the relative use of the cable and satellite mediums and, accordingly, to grant

[16] We used term "basic satellite transmission capacity" to identify the satellite circuits Comsat then offered to carriers under its Tariff FCC No. 101. Our *Authorized User II* policy required Comsat to provide to users precisely the same satellite circuits that it provided to carriers, neither more nor less, and to charge such users the same rate for the same service. Such basic transmission capacity consists of space segment — the "uplink" between a U.S. earth station and an INTELSAT satellite—plus associated earth-station services. As will be discussed more fully in paras. 20-21, *infra.*, for consistency with our recent Report and Order in *Earth Station Ownership*, we believe it necessary to clarify the service Comsat's World Systems Division will be authorized to provide directly to users. Briefly, under the policy we adopt today, the World Systems Division will be limited to provision of the uplink ("space segment"). The user will be required to obtain earth-station services separately from one of the competitive suppliers of such service.

[17] The term "composite" rates arose during the implementation of our 1966 *Authorized User I* decision. In our policy statement we had directed the carriers to review their tariffs and to assure that their rates properly reflected the economies of satellite transmission. The carriers sought to meet this requirement by filing new leased-channel rates where they "composited" or added the costs of cable-based service with those of satellite-based service and taking a simple arithmetic average of the two.

the carriers greater discretion in making circuit activation (loading) decisions.

D. The Court Decision

7. In remanding our 1982 Report and Order, the Court of Appeals upheld our authority under the Satellite Act to authorize direct public service by Comsat. The court, however, found that we had abused our discretion by not considering the issues raised in the *Direct Access* and *Earth Station Ownership* proceedings before seeking to implement our *Authorized User II* policy.

8. In assessing the relevance of the *Direct Access* and *Earth Station Ownership* issues to the public-interest impact of *Authorized User II,* the court focused its analysis on the effect they might have on "intramodal" competition (that is, competition between Comsat and the IRCs for the provision of satellite-based services) and on "intermodal" competition (competition between cable-based and satellite-based services). The court stated that intramodal competition is not feasible since Comsat's charge for a satellite circuit is so much lower than the IRC charges for leased-channel service. The court also doubted the feasibility of intermodal competition because it believed cable circuits are substantially more costly than satellite circuits and that Comsat could thus underprice any IRC cable-based service. As a result, the court concluded that the IRCs would lose virtually all their leased-channel customers to Comsat. The court was concerned that the loss of the IRCs' leased-channel business would leave them with unused cable circuits which they would shift to their exchange (telex) service. Because of cable's higher cost, the court speculated that the IRCs might increase their telex rates in order to maintain their rates of return and to satisfy their revenue requirements.

9. The court speculated that a grant of *Direct Access* would make successful intramodal competition more likely because it would permit the carriers to obtain space segment capacity at a rate lower than Comsat's tariff and might, therefore, allow them to offer a more competitive satellite-based leased-channel service. Similarly, the court speculated that a policy allowing carriers to own their own earth stations would also enhance the likelihood of intramodal competition because it would give the carriers an ownership interest in the satellite medium and, thus, a greater incentive to use satellite for their services.

10. The court noted, however, that enhancement of intramodal competition might in some respects be inconsistent with enhancement of intermodal competition. That is, the court observed that, theoretically, the way to achieve maximum intermodal competition would be to limit the IRCs to ownership of cable facilities and Comsat to ownership of satellite facilities, so that each entity would have an owner's incentive to develop

its respective type of facility. The court noted, however, that direct access and independent earth stations would compromise such a theoretical separation by giving the IRCs an investment interest in both cable and satellite facilities and, thus, an incentive to shift some traffic to satellite facilities. Such an eventuality, the court concluded, might tend to neutralize competition between cable and satellite.

11. The court also speculated that allowing the IRCs to own their own earth stations might alter the cost of earth-station access. Independent earth stations, the court noted, could either reduce the costs of earth-station services (if the carriers can offer service more efficiently than Comsat) or increase such costs (if station capacity increases faster than demand for service). A lowering of earth-station costs would make the satellite medium more attractive to users and, thus, weaken the competitive position of cable, while an increase in costs would make cable more attractive and enhance cable/satellite competition. Finally, the court argued that a grant of *Direct Access* or *Earth Station Ownership* would likely affect Comsat's decision to offer retail exchange services. The court reasoned that a grant of the *Direct Access* and *Earth Station Ownership* policies would free the carriers from the necessity to deal with Comsat and motivate Comsat to enter the exchange-service market to protect its revenues. The court thus concluded that the way we resolve the *Direct Access* and *Earth Station Ownership* proceedings could have a material effect on how our *Authorized User II* policy works in practice. The court did not ordain adoption of either policy, but required us to resolve them before proceeding with our *Authorized User II* policy.

E. Subsequent Action

12. *Direct Access.* Subsequent to the decision of the Court of Appeals, on March 30, 1984, we adopted a Report and Order in the *Direct Access* proceeding, denying the carrier proposals and terminating the proceeding. We concluded that none of the proponents of direct access had shown that it would serve the public interest.[18] We further found that direct access

[18] In *Direct Access* we considered a number of proposals by the IRCs for modifying the arrangements under which they acquire the INTELSAT satellite circuits they use in providing their services. Among these was the "capitalized lease" option under which the carriers would include in their rate bases the amounts they pay Comsat for satellite leases. The other capital-acquisition (*i.e.*, included in rate base) option was the indefeasible right of user (IRU) in INTELSAT satellite circuits under which the carriers would invest in INTELSAT directly (by paying Comsat an amount equal to Comsat's per-circuit share of INTELSAT investment) and pay Comsat a "ministerial fee" to recover Comsat's separate costs. The carriers would separately acquire earth-station services and pay their ratable share of INTELSAT operating expenses. The IRCs also included an option variously described as a "non-capitalized lease", "cost-based access" or "direct economic access," under which the carriers would acquire INTELSAT space segment at what they allege to be the price Comsat pays to acquire it: the INTELSAT utilization

would not reduce any of the fixed costs of the INTELSAT satellite system, but would merely divide the U.S. share of those costs (now borne by Comsat) among several entities. We indicated a reluctance to undertake such a major restructuring of the international satellite market where benefits were not clearly demonstrated.

13. We also found that direct access would not substitute for regulation of Comsat's rates. Implementation of direct access would require us to determine Comsat's costs and to engage in continuing oversight of the ministerial fee. The IRCs had argued that Comsat's charges for circuits are excessive, that direct access would allow the carriers to acquire satellite circuits at a lower price, and that they could pass the savings through to their users. We concluded, however, that the concern of the carriers about Comsat's rates would be better addressed directly through rate regulation. In that connection, we noted that the goal of our recent *Comsat Structure* proceeding was to structure Comsat's operations and accounts so as to segregate Comsat's monopoly activities from its competitive activities and, thus, to allow us more easily to regulate Comsat's rates. We also required Comsat in the *Comsat Structure* proceeding to retarget its rates to meet the rate of return we prescribed in the *Comsat Rate Case.*[19] As a result, we decided not to proceed further with the direct access proposals, and terminated the proceeding. We did not, however, find direct access unlawful or foreclose the possibility that we might revisit the direct access question.

14. *Earth Station Ownership.* Also on March 30, 1984, we issued a Notice of Proposed Rulemaking in the *Earth Station Ownership* proceeding. On December 4, 1984, we adopted a Report and Order in *Earth Station Ownership,* FCC 84-605, __ FCC 2d __. We there made final our tentative conclusion that the public interest would be served by permitting individual carriers to construct and operate their own earth stations outside the current ESOC consortium.[20] That is, we shall allow individual carriers to build and operate their own earth stations in competition with the ESOC stations and with other independent stations.

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charge (IUC) (currently $390 per circuit, per month). We used the term "direct access" in a general sense to encompass all the proposals to bypass Comsat.

[19] Communications Satellite Corporation, 56 FCC 2d 1101 (1975), *aff'd in part sub nom.* Comsat v. FCC, 611 F. 2d 883 (D.C. Cir. 1977), *order on remand,* 68 FCC 2d 941 (1978). In that case we allowed Comsat a rate of return of 11.48 per cent.

[20] In *Ownership and Operation of Earth Stations,* 5 FCC 812 (1966), we authorized the ownership and operation of U.S. earth stations operating with the INTELSAT system to a consortium known as the Earth Station Ownership Committee Consortium (ESOC), which consists of Comsat and the U.S. service carriers using the station. Under that policy, three consortiums have been created: one for the stations serving the U.S. mainland (the 48 contiguous states plus Alaska), one for Hawaii and one for Guam. In each consortium Comsat owns 50 per cent of the stations and the remaining 50 per cent is held by the using carriers in approximate proportion to their level of usage of the station.

We also directed the members of ESOC to negotiate the future of ESOC, giving them discretion either to retain the ESOC arrangements or to terminate the consortium and disperse the assets thereof as they may agree upon and we may approve. To protect against cross-subsidization or other anticompetitive conduct, we required Comsat to move its investment in the ESOC and any future independent earth stations from its World Systems Division to a separate common-carrier subsidiary. We also required Comsat to unbundle its current Tariff FCC No. 101 and directed the World Systems Division to file a separate, cost-justified tariff for space segment and the Comsat earth-station subsidiary to file a tariff for earth-station services.

F. Futher Notice of Proposed rulemaking

15. In our Further Notice we noted the directive of the Court of Appeals that we consider the impact of our resolution of the *Direct Access* and *Earth Station Ownership* issues prior to implementing a modified *Authorized User II* policy. We also noted in our Further Notice the Report and Order in *Direct Access* and the Notice of Proposed Rulemaking in *Earth Station Ownership.* As a result, we requested additional public comment on our proposal to modify our 1966 *Authorized User I* policy. In this connection, we stated our continued, tentative preference for a policy allowing Comsat (through its World Systems Division) to lease satellite circuits directly to users at U.S. earth stations and allowing Comsat (through a separate subsidiary) to become a common carrier providing end-to-end, international communications services.

16. The comments filed in response to our Further Notice fall into three broad categories. First, Comsat, AT&T, the governmental entities, and users support readoption of our *Authorized User II* policy. Opposing them, the IRCs seek rejection of our proposed policy or, if we decide to proceed, seek to condition the policy upon a grant of direct access. Finally, a number of respondents raise issues not addressed by the Further Notice. DoD seeks designation of itself and other governmental users as "statutory" authorized users who may take end-to-end service from the Comsat World Systems Division, irrespective of any separate-subsidiary requirement we might impose on Comsat's provision of service to other classes of users. IRI seeks additional restrictions upon Comsat to prevent it from abusing its position as U.S. Signatory to INTELSAT in competing for the provision of earth-station services. Finally, the television networks seek assurance that the separate-subsidiary proposals in *Authorized User II* and *Earth Station Ownership* will not disturb the right of users under the *SIN* decision, *supra.* n. 11, to take end-to-end television-transmission service directly from the Comsat World Systems Division.

II. Discussion

A. Overview

17. After reviewing the comments of the parties, we have again decided to broaden the category of users authorized to take service from Comsat. We shall allow Comsat, through its World Systems Division, to offer space segment directly to users, including enhanced-service providers, at U.S. earth stations and allow Comsat, through a separate common-carrier subsidiary, to provide end-to-end services.[21] We shall also allow service carriers discretion to "decomposite" their leased-channel rates, so as to charge separate rates for cable-based and for satellite-based service, or to continue to charge a single, composite rate.

18. We find nothing in the comments which suggests that our 1982 decision to allow Comsat to offer service to the public was erroneous.[22] We continue to believe that allowing Comsat to engage in expanded public operations will increase customer choice and, by removing arbitrary restrictions on participants in the international communications market, lead to a freer market with fewer economic distortions. Our policy will give users additional service and carrier options and exert a downward pressure on rates for international services. We do not anticipate any significant public detriments as a result of our revised *Authorized User II* policy. We find no reason to expect the existing service carriers to lose substantial amounts of leased-channel revenue such as would imperil their financial integrity, lead to higher rates for service, or impair the ability of the carriers to serve the public. Most importantly, we believe that any potential detriments to existing carriers will be outweighed by the benefit to users from increased choice in meeting their communications needs.

19. We do not interpret the decision of the Court of Appeals to remand our 1982 Report and Order as rejecting, as a matter of law, our *Authorized User II* policy. We also do not interpret the court's decision as limiting our discretion in fashioning an authorized-user policy which we believe best serves the public interest. Indeed, the court specifically upheld our authority to determine the scope of Comsat's public operations, including the authority to replace the carrier's carrier market

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[21] In our 1982 Report and Order, we found that allowing all users to take service directly from Comsat would facilitate implementation of our *Computer II* policy. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration* 84 FCC 2d 50 (1980), *further reconsideration* 88 FCC 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied* 51 U.S.L.W. 3826 (U.S. May 16, 1983). Allowing non-carriers such as enhanced-service providers to deal with Comsat should assist them in offering their services internationally without the need to become a Title II common carrier.

[22] We have considered all the issues raised by respondents. However, in the discussion which follows, we deal only with the arguments we find significant. Issues not specifically addressed herein, we find without merit.

structure with one which allows Comsat to compete at the retail (end-to-end) service level. The court further made clear that it was not imposing its judgment on the merits of increasing competition between the cable and satellite mediums. *See* 725 F. 2d at 734, n. 52. Rather, the court merely directed us to resolve the *Direct Access* and *Earth Station Ownership* matters before implementing our *Authorized User II* policy. We have satisfied that condition precedent and have considered those decisions in readopting the *Authorized User II* policy.

B. Clarification of Authorized User II Policy

20. A number of the respondents in this proceeding have noted what they characterize as an inconsistency between our *Authorized User II* policy as we formulated it in 1982 and the policy we subsequently proposed in *Earth Station Ownership.* Our 1982 *Authorized User II* decision allowed Comsat to offer "basic satellite transmission capacity" directly to users at U.S. earth stations. Basic satellite transmission capacity is the monopoly service Comsat provides to carriers under its Tariff FCC No. 101. At the time of our 1982 decision, basic satellite capacity included both space segment and earth-station services. The respondents, however, note that allowing the World Systems Division to provide earth-station services is inconsistent with our requirement in *Earth Station Ownership* that Comsat offer such services only through a separate subsidiary. Our Further Notice was silent on the question, but several of the respondents state that they interpret our action in *Earth Station Ownership* as a modification of our *Authorized User II* policy to limit the Comsat parent to the provision of space segment capacity. We wish to confirm this interpretation.

21. In the policy we adopt today, we shall require Comsat's World Systems Division to offer INTELSAT space segment capacity to all users at any U.S. earth station which operates with the INTELSAT system. In our recent Report and Order in *Earth Station Ownership* we required Comsat to offer earth-station services through a separate common-carrier subsidiary. We also required Comsat to unbundle its current tariff charges into separate charges for space segment and earth-station service. Because of the separate-subsidiary requirement, the earth-station tariff will actually be filed by the Comsat earth-station subsidiary, while Comsat's World Systems Division will file the space segment tariff.[23] Limiting the World Systems Division to the provision of space segment

[23] To the extent that Comsat wishes to compete with the IRCs in the provision of leased-channel and other end-to-end service, it would do so through a separate subsidiary. That subsidiary would be free to lease space segment from the World Systems Division, at normal tariff rates. The end-to-end subsidiary would then be free to take earth-station services from any supplier of earth-station services or to construct its own earth stations.

will further isolate Comsat's monopoly activities from its competitive activities and prevent cross-subsidization. The World Systems Division's offer of space segment capacity will increase user choice and will yield the competitive benefits we enumerated in our 1982 *Authorized User II* order. Our *Earth Station Ownership* policy will yield additional competitive benefits by allowing users to obtain earth-station services from a variety of providers, including ESOC, the Comsat earth-station subsidiary or an independent carrier supplier.

C. Public-Interest Analysis

22. In carrying out the mandate of the Court of Appeals on remand, we are required to consider anew the likely impact on the public interest of our proposal to broaden the scope of Comsat's public operations. Our inquiry in this Second Report and Order is somewhat simplified, however, by the fact that even in remanding our decision the court affirmed or let stand a number of the legal and policy conclusions in our 1982 Report and Order. Most importantly, the court upheld our legal authority under the Satellite Act to modify our 1966 *Authorized User I* decision. That is, the court held, 725 F. 2d at 742-6, that the plain language of the Satellite Act and its legislative history gives us broad discretion to determine who may be authorized to take service from Comsat and affirmed that our decision in 1966 to restrict Comsat was solely one of policy. More specifically, the court held that we need not maintain the "two-tier" (*i.e.*, carrier's carrier) market structure we adopted in 1966 and that we have the power to authorize non-carriers to lease satellite circuits from Comsat, so long as such designation serves the public interest. The court also specifically held that the Satellite Act empowers us to authorize Comsat to compete with the existing service carriers at the "retail" (*i.e.*, end-to-end) level.[24] For this reason, inasmuch as the question of our legal authority has been resolved, we need not address it further here.

23. Turning to the policy question, we note that the traditional standard we as a regulatory agency must apply in deciding whether to introduce competition into a market is found in *RCA Communications, Inc. v. FCC,* 346 U.S. 86 (1953) *See also Telocator Network of America v. FCC,* 691 F. 2d 525 (D.C. Cir. 1982), *Hawaiian Telephone Co. v. FCC,* 589

[24] A variety of terms have been used in this proceeding to characterize the two levels of the international market such as "retail" versus "wholesale" and "basic transmission capacity" versus "end-to-end" services. The Court of Appeals used the wholesale/retail dichotomy, apparently having accepted the IRCs argument that Comsat acts as a wholesaler of satellite circuits which they resell at "retail." In our 1982 Report and Order, and in the discussion which follows, we use the term "end-to-end" services to refer to the bundle of services the IRCs now provide. This term appears to be synonymous with the way the court uses the term "retail" in confirming our authority to allow Comsat to deal with end users.

F. 2d 647 (D.C. Cir. 1978). In the *RCAC* case, the United States Supreme Court established a two-pronged test wherein we are required to find that the competition is reasonably feasible and then to warrant that increased competition will yield public benefits. 346 U.S. at 96-7. In our 1982 Report and Order we found that allowing Comsat to offer basic satellite transmission capacity directly to users would increase customer choice and would put competitive pressure on the providers of international leased-channel service to keep rates low and service innovative. We also found that allowing a Comsat subsidiary to enter the end-to-end service market would introduce another technologically-sophisticated and well-financed competitor with a particular interest in developing the satellite medium. Our analysis of the expanding international market was that competition was reasonably feasible and we warranted that our policy would likely yield public benefits.

24. Changes in the international communications market since 1966 have given us the opportunity to re-examine the structure of that market. As we indicated in 1982, the pessimism we expressed about the future of the established carriers is no longer warranted and the conservative policy we fashioned based on that pessimism to protect carriers from competition can no longer be justified. The international communications market is growing rapidly, and AT&T and the IRCs are established carriers. We now find that the public interest will be better served by allowing Comsat to offer service directly to users. Such direct dealing will increase customer choice, thus spurring not only Comsat but also the providers of cable-based services to keep their services innovative and to keep the price for service as low as possible. Comsat's World Systems Division's direct provision of space segment will give customers an alternative to traditional leased-channel service and may reduce the charges users now pay. Allowing a Comsat subsidiary to offer end-to-end services will similarly increase carrier and service options for users and act as a check upon the ability of other carriers to raise the rates for substitutable services. Our decision to allow the carriers to decomposite their rates will permit providers of cable-based services similarly to develop any service or cost advantages of cable facilities and act as a check upon Comsat's rates. Our revised *Authorized User II* policy, thus, will advance the goals of the Communications Act to promote rapid, efficient, international communications services at reasonable charges. It will also better advance the twin goals of the Satellite Act: "the reflection of the benefit of [satellite] technology in both quality of services and charges for such services . . .," 47 U.S.C. § 701(b), and "to maintain and strengthen competition in the provision of communications services to the public." 47 U.S.C. § 701(c).

25. The court agreed with our analysis of the benefits of the *Authorized User II* policy. The court, however, disagreed, with our

conclusion that our policy was unlikely to have any significant public detriment. We concluded in 1982 that the IRCs would be able successfully to compete under our policy and would not suffer any significant loss of leased-channel or exchange-service revenues. The court, however, concluded that a substantial revenue loss was likely. In our analysis of possible public detriments we assumed a worst-case scenario. We hypothesized that all of the carriers' leased-channel customers would elect to lease space segment capacity from Comsat and that the IRCs would lose all their leased-channel revenues. We emphasized that such a loss is a private detriment and relevant to the question of the public interest only to the extent that it adversely affects the type, quality or price of service available to the public—that is, if it appears likely that the loss of revenues "will so severely impair the economic base of existing carriers that the industry will experience an incidence of failure so high as to impair provision of service to the public." *Telocator v. FCC,* 691 F. 2d at 544. Based on that standard, we concluded that public detriments are unlikely to result from adoption of our *Authorized User II* policy. We noted that the IRCs' leased-channel revenues represent only about 20 per cent of their total revenues, and contribute very little to their overall profitability. 90 FCC 2d at 1413. We thus concluded that the loss of all leased-channel revenues would be unlikely to threaten any of the IRCs. The court assumed the same worst-case scenario and agreed that the loss of leased-channel revenues would not destroy any of the IRCs. The court, however, found some detriment likely in another area: the court speculated that a loss of leased-channel revenues could lead to higher rates for "exchange" (*i.e.,* telex) service.[25] *See also* para. 8, *supra.*

26. The court, however, also stated that its disagreement on the possibility of public detriments was not sufficient, alone, to overturn our policy, since the detriments may be outweighed by the benefits. Rather, the precise grounds on which the court based its remand were procedural: the court found that we had failed to consider some points it found relevant to the determination of the impact of our proposed policy, and that we had, therefore not properly discharged our duty under the Communications Act. The court noted that the carrier proposals under consideration in the *Direct Access* and *Earth Station Ownership* proceedings appeared in some ways to be consistent and in other ways inconsistent with our goal of increasing intermodal competition. However, said the court, until we had resolved those related proceedings, and considered their impact on *Authorized User II,* neither it nor we would be in a position to make a reasoned cost/benefit analysis of our *Authorized*

[25] The court did not define the term "exchange" or otherwise specify the services where it expected increased costs. The court appears to have picked up the term from our 1966 *Authorized User I* decision, where we used it to mean telex service.

User II policy. The court therefore remanded the matter to us for further proceedings.

27. On the public-interest question the IRCs offer in their comments little that is new. They largely repeat the arguments against our proposed policy that we rejected in the earlier phase of this proceeding. The IRCs' main argument against our policy is their assertion that they will not be able to compete with Comsat if it is allowed to offer satellite capacity directly to end users. While they argue this as an absolute, their chief purpose appears to be to reargue the *Direct Access* proceeding. That is, the IRCs state that they will be able to compete with Comsat under our *Authorized User II* policy only if we grant them direct access to INTELSAT and the right to own their own earth stations. The carriers further argue that the Court of Appeals has held competition with Comsat not to be feasible unless the Commission also grants them direct access to INTELSAT. ITTWC, in fact, suggests that this holding may, as a matter of law, be binding upon us. The carriers addressed their comments to our original proposal which would have concerned "basic satellite transmission capacity" (*i.e.*, space segment plus earth-station services), but made it clear that restricting the World Systems Division solely to offering space segment would not alter their need for direct access.

28. The IRCs also argue that their leased-channel service adds nothing to the satellite circuits Comsat now provides under its Tariff F.C.C. No. 101. As a result, the carriers argue, if customers can lease satellite capacity directly from Comsat at the same tariff rate the carriers pay, most of those customers will shift to Comsat for service. Thus, since the carriers equate themselves to "retailers" of "wholesale" Comsat satellite circuits, allowing customers access to Comsat will put them in a "wholesale/retail price squeeze" where they can offer satellite-based leased-channel service only at a loss. The IRCs estimate that they will lose a substantial number (about 75 per cent) of their current leased-channel customers to Comsat. Further, the carriers claim that they will not be able to compensate for those losses by offering cable-based service, arguing that we have held cable circuits to be too costly for successful competition with Comsat satellite circuits.

29. We should first like to comment upon ITTWC's suggestion that the Court of Appeals has determined that competition under our policy is not feasible as a matter of law. We agree with ITTWC that the court was not sanguine about the ability of the IRCs to offer their traditional leased-channel service if customers are able to lease space-segment capacity directly from Comsat. *See* 725 F. 2d at 748. However, we do not interpret the court's language as a clear holding that competition is not feasible or, more importantly, that we are barred from readopting our *Authorized User II* policy. The court stated it was not expressing any opinion on the

merits of increasing competition between the cable and satellite mediums. *Id.* at 752. The court also stated that it was not mandating either direct access or a policy allowing independent ownership of earth stations. *Id.* at 754. The court speculated that such policies might reduce the IRCs' cost of using satellite circuits and thereby improve their chances of continuing to offer satellite-based leased-channel service. *Id.* at 752-5. The court, however, made clear that even the loss of all the IRC leased-channel revenues would not be enough, in itself, to reject our policy. The court also made clear that it was not substituting its judgment for ours in formulating an authorized-user policy which we find best serves the public interest. *Id.*, n. 52. Rather, the court merely directed us to consider the *Direct Access* and *Earth Station Ownership* issues and to determine whether our resolution of those proceedings would affect our determination to proceed with the *Authorized User II* policy.

30. We have now acted in both related proceedings. We have decided to deny direct access, but to allow the carriers to own their own earth stations. To show the effect of these actions on our *Authorized User II* policy, we shall follow the same two-part analysis used by the court. We shall look separately at the questions of intramodal (within the satellite medium) and intermodal (between cable and satellite) competition. The court believed that direct access and the right to own earth stations might reduce the IRCs' cost of using satellite facilities and thus might help them successfully to compete with Comsat. In our *Direct Access* decision, we concluded that direct access would not reduce satellite costs or assist intramodal competition. In *Earth Station Ownership,* we concluded that IRC ownership of earth stations could reduce IRC costs and might help them offer low-cost, efficient satellite-based services.

31. *Intramodal Competition.* Looking first at direct access, we note that our March 30 Report and Order in the *Direct Access* proceeding included an extensive analysis of the economic effects of the IRC direct-access proposals. *See* 97 FCC 2d at 310-19. We then discussed why direct access would not significantly affect the feasibility of intramodal competition under *Authorized User II. Id.* at 319-26. We shall not repeat that analysis here, but adopt it by reference. For present purposes, we note that direct access would not introduce competition into the provision of INTELSAT space segment, but would merely spread Comsat's investment among multiple U.S. entities. Direct access would not increase the supply of INTELSAT circuits. Dividing the U.S. share of INTELSAT investment and operating expenses, now borne by Comsat, among multiple U.S. entities would not reduce any element of that investment or those operating costs. Direct access, thus, would hold little promise of reducing IRC satellite costs.

32. To see why direct access would not affect intramodal competition, it may be helpful to describe the nature of that competition. In the first place, the IRCs would not compete with Comsat for satellite-based leased-channel service. The IRCs do not alter the circuit they acquire from Comsat, but add connecting circuits and a variety of ancillary services such as conditioning, testing, quality control and handling their customers' payments to foreign administrations. The World Systems Division is forbidden under *Authorized User II* to add to space segment any services it does not now provide to carriers. A customer wishing to lease space segment from Comsat must make its own arrangements for these services. The competition then will be between the IRCs and their customers for who can make these arrangements most efficiently. In either case, Comsat will receive the same tariff charges. Any diminution of IRC leased-channel revenues is a measure of customer savings, not "diversion" or unfair advantage to Comsat.

33. The court concluded that there is essentially no difference between Comsat space segment and IRC leased-channel service or at least that the services the IRCs provide are not valuable enough to attract customers.[26] We agree that there may be a question as to the value of IRC service. We emphasize that a Comsat satellite circuit is of no value to users without the ancillary services now provided by the IRCs. As the court noted, however, there is a large gap between the rate Comsat charges for a satellite circuit ($1125 at the time of the court's decision and $1060 now) and the IRCs composite leased-channel rates (which range from about $3000 for a circuit to the United Kingdom to about $5000 for a circuit to the Pacific basin).

34. One of the IRCs (RCAGC) argues that the packaging services the IRCs provide save their customers time and effort and have value.[27] DoD, the largest U.S. user of leased-channel service, and the type of sopohisticated user the court thought would elect to deal with Comsat, has confirmed RCAGC's assertion and indicated that it will continue generally to deal with the IRCs.[28] We are not able on the evidence before us to

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[26] 725 F. 2d at 748, n. 40. The court concluded that the connecting links and "quality-control" service the IRCs add are not enough to allow the IRCs to compete, since "[p]resumably, Comsat . . . is capable of providing an equally efficient quality control system." *Id.* The court, however, overlooks the fact that our policy allowed Comsat to provide only bare satellite circuits. Comsat does not now provide connecting links or end-to-end quality-control service to carriers and will not do so under our revised policy.

[27] *See* Affidavit of Kenneth H. Lassig, Vice President-Finance and Treasurer, RCA Global Communications, Inc., at paras. 4-9, attached as Appendix A to RCAGC's Emergency Petition to stay the *Authorized User II* decision.

[28] *See* Affidavit of Lieutenant General William J. Hilsman, Director, Defense Communications Agency, DoD, attached to Opposition of Federal Communications Commission to Emergency Motion for Stay, *ITT World Communications Inc. v. FCC, supra* note 1. General Hilsman stated that DOD would seek to take service directly from Comsat only

decide the value of IRC services. We note tht in their eagerness to preserve their protection from competition the IRCs have chosen to cast doubt on the value of their contribution. If the IRCs are correct that they add nothing to leased-channel service, it is likely that their customers will prefer to deal directly with Comsat. If, on the other hand, RCAGC and DoD are correct, the IRCs do add value and should be able to attract and hold customers.[29] Our policy merely lets customers choose between Comsat and IRC service and gives them information as to alternative costs on which to base their choice.

35. If the court and the IRCs are correct about the price sensitivity of leased-channel service, direct access will not help the IRCs retain their customers. As we explained in our *Direct Access* decision, direct access would not allow the IRCs to acquire space segment at a price significantly lower than Comsat's current tariff charges. The court was concerned that, so long as Comsat can offer space segment at a rate appreciably lower than the IRC composite rates, it would attract the IRCs' customers, irrespective of direct access. The IRCs could compete with the World Systems Division rates if they were to decomposite their rates and charge a satellite-only rate which allows them to lease a Comsat circuit, add their extra services and sell the package at an attractive rate. The IRCs can do this without direct access.

36. By contrast, our decision in *Earth Station Ownership* to allow IRC ownership of earth stations can reduce the IRCs' cost of using satellite facilities and might help them in intramodal competition. Comsat indicates that approximately 40 per cent of its current tariff charge for a voice-grade circuit ($424) is attributable to the cost of the earth-station services Comsat acquires from ESOC.[30] Allowing the IRCs to own earth stations will allow them to realize any cost savings available from efficient operation. If they can provide earth-station services more efficiently than Comsat or ESOC, they can apply that advantage to the marketing of lower-cost end-to-end services. Our revised earth-station policy will not reduce the cost of space segment, which they will continue to lease from the World Systems Division, but it could assist them in competing with a Comsat end-to-end subsidiary which must also lease space segment from the World Systems Division at the same rate.

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in those unique instances where national security requires earth stations to be located on government premises.

[29] Another service the IRCs add is the fact that they have operating agreements with overseas administrations. It remains to be seen how easy it will be for end users to persuade those administrations to deal directly with them. We do not anticipate that obtaining such agreements will be impossible, but do think that the fact that the IRCs already have operating agreements will help the IRCs compete with their customers.

[30] Comsat owns no earth stations of its own. It owns 50 per cent of ESOC and operates the ESOC stations on behalf of its partners.

37. In conclusion, while there is likely a rate at which the IRCs can offer satellite-based leased-channel service and retain their customers, we cannot guarantee this will occur. Predictions of future events are necessarily imprecise and not susceptible of concrete proof. The Supreme Court in *RCAC v. FCC* recognized this fact and did not require such proof. IRC ownership of earth stations will assist them in intramodal competition. Direct access would not. The important point is that there is no reason to preserve the IRCs as middlemen in leased-channel service unless they perform a useful function. If the IRCs cannot offer leased-channel service at competitive rates and elect to abandon the market, service will be available from Comsat. We see no justification to protect the IRCs from their customers or to deprive users of choice. The legitimate interest of the IRCs underlying their direct-access proposals — the possibility that Comsat rates are too high — are better addressed through traditional rate regulation. We wish to assure the IRCs that we shall scrutinize Comsat's rates.[31]

38. *Intermodal Competition.* Turning now to intermodal competition, we conclude that neither direct access nor expanded earth-station ownership would affect the ability of the IRCs to offer cable-based leased-channel or other services in competition with Comsat. Our policy will introduce intermodal competition for the first time. We will thereby give Comsat the opportunity to promote the satellite medium and to give cable-owning carriers a greater incentive to provide services efficiently or to construct more efficient facilities. Users will benefit from these events if Comsat can offer satellite-based services at a lower price than current IRC rates. To the extent that Comsat does this, it will put pressure on the rates for cable-based services. To retain their customers, the IRCs may be required to reduce the charges for this cable-based service. If, as the IRCs claim, they cannot reduce their cable rates, they may lose their customers. However, so long as Comsat can provide those services, the public will not be deprived of service.

39. We are not able to say whether, in general, cable circuits are more costly than satellite circuits. The IRCs offer no cost data to support their claim. AT&T challenges the assertion but also provides no cost information. It is difficult to make a determination of relative costs in the abstract, since such costs vary from route to route and from facility to facility, depending upon the distance between service points, the technolo-

[31] We particularly reject the arguments of the IRCs concerning our ability successfully to regulate Comsat. The structural separation we order here and in *Earth Station Ownership* will assist us in the discharge of our duty. We note, in this connection, that the Court of Appeals has recognized our ability to regulate. *See* 725 F. 2d at 746, f.n. 32. Our decision in *Comsat Structure* to require Comsat to recast its accounts and cost allocations to separate competitive from monopoly activities was similarly intended to assist us in regulating Comsat's rates.

gy used in a particular facility and the density of traffic. Moreover, since technology and service patterns are changing so rapidly, any such determination would rapidly become stale.[32] However, we are willing for present purposes to accept the IRCs' argument that cable circuits are more costly. Such an assumption would not justify rejection of the *Authorized User II* policy. Rather, it would merely illustrate that the present market incentives have not resulted in an efficient use of resources and demonstrate why we prefer a competitive policy. If cable circuits were more expensive, that would mean that there was a cheaper alternative, namely satellite circuits, which the IRCs elected not to use. The IRCs' preference for cable circuits, under their argument, increased the users' cost of service. *Authorized User I,* by neutralizing competition, prevented Comsat from offering satellite-based service to users and allowed the IRCs to invest in less efficient facilities. We see no reason why users should be required to pay a higher cost for cable-based service, if they can get cheaper satellite-based service. Our policy will give users a choice between cable-based and satellite-based service. The possibility that users will choose satellite-based service and that the owners of cable facilities could lose revenues is, however, a private impact which bears upon the public interest only if it threatens the availability to users of reasonably-priced, good quality service (*i.e.,* if it causes the carriers to go out of business or so weakens them that they cannot provide good quality service).

40. We are also unpersuaded by the IRCs' argument that they need protection from competition because they do not have cable facilities on all routes. Although there are some routes on which only satellite facilities are in use, the service carriers have extensive cable networks in the North Atlantic, Caribbean and Pacific basins and use both facilities to serve those countries which account for more than 70 per cent of their revenues. The IRCs make substantial use of cable facilities for leased-channel service. For example, more than 50 per cent of the carriers' voice-grade

[32] We feel it is necessary, however, to comment upon the cost analysis the court included in its decision. In concluding that satellite circuits are cheaper than cable circuits, the court compared the projected half-circuit capital-acquisition cost (purchase price) for the TAT-8 cable, $15-19,000 per half circuit, with what the court called the "present cost" of a satellite circuit, which it estimated at $13,500. *See* 725 F. 2d at 749. The court thus compared a cable circuit's purchase/construction price with a satellite circuit's revenue requirement. This is not a proper comparison. Comparisons can only be made between different facilities when similar factors such as construction costs per circuit or revenue requirements are appropriately employed. The purchase price of a facility reflects only the bare cost of building or acquiring it. It does not include overhead expenses, a return on capital, or the number of circuits utilized at any one time. A revenue requirement includes a fraction of all overhead (taxes, salaries, administrative, etc.) expenses plus a return on the capital invested in the facility. A revenue requirement is also spread only over the circuits actually utilized.

leased circuits are on cable. In any event, the geographic distribution of cable and satellite facilities does not represent a basis on which to justify withholding the benefits to users of our *Authorized User II* policy.

41. *Impact upon Exchange Services.* More fundamentally, the court was clear that it was not concerned about the possible loss of IRC leased-channel revenues *per se.* Rather, the court stated that its concern was a possible adverse effect of our policy on users. Thus, the court found the IRCs' potential loss of revenues relevant only because it feared that the IRCs would shift cable circuits idled by a loss of leased-channel customers to the provision of their exchange (telex) services and, because of the higher cost of those facilities, would raise the charges therefor to an unreasonable level.

42. The court, however, did not regard a rise in telex rates as inevitable. While the court did conclude that our policy would increase the costs of cable-based exchange services, it noted two ways an increase in exchange-service rates might be avoided: either the IRCs might use satellite circuits to provide their exchange services or Comsat might offer retail exchange services in competition with the IRCs. The court, however, found neither eventuality likely. The court noted that the IRCs have a strong economic incentive to use their cable circuits, since their investment in cable circuits constitutes the largest portion of their rate base investment for ratemaking purposes. Since regulated entities are allowed to earn a return (profit) on their investment, but not on satelite leases (which are expenses), the court found it unlikely that the IRCs would use satellite circuits. Rather, the court concluded that the IRCs would elect to use their cable circuits and would raise the charges for their services therefor.[33] With respect to the possibility of Comsat entry, the court noted Comsat's "steadfast" determination not to offer retail services. The court also speculated that it would be costly and difficult for Comsat to provide exchange services, even if it wished to do so, and concluded that Comsat entry is "highly unlikely." 725 F.2d at 751.

43. We find it unlikely that adoption of *Authorized User II* will lead to an unreasonable increase in the rates for exchange services. The IRCs do not argue that they would raise telex rates or show why *Authorized User II* would cause such an increase. It is not clear how much freedom the IRCs have to raise their exchange-service rates. The international exchange-service business is becoming increasingly competitive. In a competitive business service providers are "price takers" — that is, the price will be set by the market rather than by individual suppliers. As a

[33] We note that decisions to route traffic via cable or satellite circuits are made jointly by U.S. carriers and their overseas correspondents. As a result, the IRCs would probably not be able to shift large amounts of telex traffic to cable circuits without the concurrence of their correspondents.

result, even if our policy should leave the IRCs with excess cable capacity, competitive pressures will keep rates down. In more concrete terms, we note that the telex service, which accounts for over 60 per cent of total IRC revenues, is offered by six carriers. Any attempt by an IRC to raise its telex rates unilaterally would cause it to lose customers to its competitors. Telex service is also increasingly subject to competitive pressure from a variety of substitutable, non-telex services offered by other entities. Some IRCs have argued that such services are making noticeable inroads into their telex business. *See, e.g.,* Application of FTC Communications, Inc., for Waiver of Uniform Settlements Policy, File No. I-S-P-84-004, at pp. 5-10, filed March 1, 1984.[34] The IRCs are unlikely further to weaken their competitive position by a substantial increase in telex rates.[35]

44. The court's speculation that exchange-service rates would rise was premised upon its assumption that the IRCs' cable circuits are substantially more costly than satellite circuits on all routes. However, we are not here concerned with the acquisition of new cable circuits, or whether such new circuits would be more expensive than satellite circuits. Rather, the court's analysis addressed the carriers' existing cable circuits. The carrier's investment in these existing cable circuits is sunk. They already have the circuits whether they use them or not. Thus, while a shift of cable circuits to telex service might increase the cost of that service on a fully-distributed-cost basis, there would be no out-of-pocket expenditure to acquire cable circuits. Their only out-of-pocket expenses would be their maintenance and operating expenses. Because the IRCs would not be required to make any out-of-pocket payments as a result of shifting cable circuits to telex service, if the IRCs were to make such a shift, they would be able to price their cable-based telex service at a level competitive with a

[34] That pleading cites three major forms of diversion of IRC telex business: direct refile, resale companies, and new services such as teletex, packet-switched data service and Datel. FTCC estimates that the IRCs are losing about 10-12 per cent of their telex revenues to refilers each year, or currently about $17 million, net of payouts. FTCC estimates the loss of revenues to resale companies at 18-20 per cent of outbound traffic, or currently $32 million, net of payouts. Other IRCs have challenged FTCC's specific estimates of diversion, but FTCC estimates the loss of revenues to resale companies at 18-20 per cent of outbound traffic, or currently $32 million, net of payouts. Other IRCs have challenged FTCC's specific estimates of diversion, but do not deny that telex is under increased competitive pressure.

[35] We recognize that the court reached its conclusion on this point in part because we had reached a similar conclusion in our 1966 *Authorized User I* decision and did not repudiate it in *Authorized User II.* In view of the current, lower costs of overseas facilities, and the fact that we follow a policy of open entry, any attempt by the IRCs to raise their telex rates unjustifiably would be likely to provoke the entry of a new supplier. As a result, it is no longer reasonable to assume that the IRCs can raise their telex rates with impunity.

Comsat satellite-based telex rate. Moreover, as we noted above in connection with leased-channel service, our *Earth Station Ownership* policy will reduce the IRCs' cost of using satellite facilities. As a result, to the extent that the IRCs use satellite circuits, our policy should help them compete for satellite-based exchange services as well.

45. The court is correct that a decision by Comsat to offer exchange services would help keep exchange rates at reasonable levels. We do not know, however, whether Comsat will in fact enter. In the earlier phase of this proceeding Comsat indicated a reluctance to do so.[36] It should be clear to Comsat that its status as sole supplier of space segment and earth-station services is no longer secure and that it may have to enter to protect its share of traffic.[37] It should also be clear to Comsat that the *status quo* has been altered and that it may no longer count on a guaranteed market share. Comsat's decision to enter would be facilitated if, as the court posits, the IRCs were to raise their exchange-service rates if Comsat thought it could provide service at lower cost. We do not know, however, whether Comsat will in fact enter the market. However, we wish to emphasize that Comsat's entry is not essential to the successful operation of our policy.[38] As AT&T noted in its comments, Comsat is a highly credible potential entrant whose mere presence "in the wings" will

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[36] We are, however, unpersuaded by MCII's argument that the failure of Comsat in the past to compete with AT&T for MTS service is evidence of "an accommodation" between the two. The more likely reason is that for the last 18 years the *Authorized User I* policy has prevented it from entering the MTS market.

[37] In our 1982 Report and Order, 90 FCC at 1425-6, we indicated our desire ultimately to remove ourselves from facilities-loading decisions. We continue to believe that no carrier should be guaranteed a specific share of traffic, and that cable/satellite loading decisions should be dictated by efficiency rather than manufacturing or rate-base considerations. Our Report and Order, however, recognized that AT&T and the IRCs have a rate-base bias in favor of cable facilities and that for nearly 20 years Comsat has been prevented from developing its own customer base. We therefore stated that, under our *Authorized User II* policy, we would allow the carriers greater discretion in circuit-activation decisions but that in the near term we would "monitor" the situation to assure that both mediums are "reasonably used." *Id.* at 1426. This language does not indicate, as the court assumed, that we shall continue prescribed-use formulas indefinitely. We are, in fact, examining the question of loading principles in a separate proceeding, *See* Overseas Communications, FCC 84-351, ___ FCC 2d ___, released August 3, 1984 [Third Notice of Inquiry]. In that proceeding we are exploring a number of proposals by the carriers for greater latitude in circuit-activation decisions.

[38] We also believe that the court has overstated the cost or difficulty a Comsat subsidiary would face in seeking to enter the exchange-services market. Comsat is in a particularly good position to obtain the necessary agreements from overseas administrations. In carrying out its INTELSAT functions Comsat has been engaged for nearly 20 years in close working relationships with the same overseas entities who would grant the operating agreements in question. Indeed it would likely be easier for the Comsat subsidiary to get such agreements than it would be for IRC leased-channel customers who would elect to lease space segment from Comsat.

exercise a salutary effect on international exchange services. For this, and the reasons set forth above, we conclude that the rates to users for telex and other exchange services will not rise as a result of our *Authorized User II* policy.

D. Ancillary Issues Bearing on Adoption of the Authorized User II Policy.

46. *Changed Circumstances.* We are also unpersuaded by ITTWC's argument that changes in the international communications industry since we released our Report and Order in 1982 have invalidated our public-interest finding. ITTWC cites tour such allegedly changed circumstances: changing earth-station technology; declining IRC rates of return; declining telex growth rates; and increased competition in the international market. With respect to the first issue, ITTWC notes that improvements in earth-station technology have allowed for smaller, less costly, but relatively efficient antennas. ITTWC argues that the development of such low-cost antennas has permitted the location of earth stations on customer premises, and reduced significantly the need for domestic connecting links in leased-channel service. ITTWC states that in the future the provision of space segment and earth-station services may become the whole of leased-channel service and, thus, further limit the role of the IRCs in such service.

47. We are aware that in some INTELSAT services (principally, IBS) there is a trend toward smaller earth stations located near major markets, but it is not clear that such a trend exists with respect to the provision of standard voice-grade circuits which constitute the vast bulk of leased-channel service. However, even accepting for the moment that there is such a trend, we do not see how that would invalidate our *Authorized User II* policy. The ability to locate earth stations on or near customer premises and the consequent reduction in connecting facilities, will benefit users through improved service quality and lower costs. Surely ITTWC is not arguing that we should deny users such benefits because it may reduce their profit margin. In any event, the trend toward customer-premises stations need not necessarily harm the IRCs. Our December 4 *Earth Station Ownership* decision limits ownership of earth stations, even those on customer premises, to the carriers and to Comsat.[39] The IRCs will have the same chance to offer customer-premises stations as will Comsat. If the IRCs can provide such service at a lower cost, they will be able to attract and hold customers. Further, any attempt by Comsat to gain an unfair competitive benefit in the earth station market will be

[39] The Satellite Act limits the ownership of earth stations to the carriers and Comsat. *See* 47 U.S.C. § 721(c)(7).

subject to our scrutiny. We have ample tools to detect and redress such actions.

48. Second, ITTWC asserts that we based our decision to adopt the *Authorized User II* policy upon a finding that the overall returns of the IRCs were excessive and that they could use those returns to cushion them against the loss of their leased-channel revenues. ITTWC contends that even if that may have been the case in prior years, IRC rates of return are now low and cannot provide such a cushion. For example, ITTWC states that the rates of return for the three largest IRCs (ITTWC, MCII, and RCAGC) during the first half of 1983 ranged between 6.3 and 9.0 per cent. ITTWC also states that its own rate of return declined from 14.5 per cent in 1980 to 10.4 per cent in 1981 and further declined to 10.2 per cent in 1982. We cannot here make any judgment on the return figures ITTWC offers, since we have no information as to how they were derived. Moreover, references to overall rates of return do not shed any light on the earnings for specific services. ITTWC, however, has missed the point of our 1982 Report and Order. We were not motivated in that order by putatively excessive IRC profits, but by the fact that our *Authorized User I* decision arbitrarily restricted the freedom of customer choice and that it had caused distortions in the market for international service. We thus concluded that the public interest would be better served by a policy which allows customers to choose the type of service which best serves its needs.

49. Third, ITTWC argues that our 1982 Report and Order relied upon a finding that telex service is growing rapidly and that those increased revenues would compensate the IRCs for the loss of their leased-channel business. ITTWC states that telex is no longer growing rapidly. For example, ITTWC states that from April 1, 1982, to March 31, 1983, IRC telex revenues grew by only eight-tenths of one per cent (from $360 to $363 million) and that for the six-month period from October 1, 1982, to March 31, 1983, there was actually a decrease in telex revenues as compared both to the immediately preceding six-month period (April 1, 1982 to September 30, 1982) and to the same period the preceding year (October 1, 1981 to March 31, 1982). Again, it is difficult to assess the significance of such gross analysis. However, we again note that our 1982 Report and Order did not rely upon the existence of excess IRC telex profits to make up for leased-channel losses. In our Report and Order, we cited the IRC rates of return and telex growth rates only to show that the pessimism about the viability of the IRCs which runs through our 1966 *Authorized User I* order was unwarranted. The changed circumstances ITTWC asserts merely show that conditions in the international market are changing and that participants in the market must change with it. They do not demonstrate a public-interest justification for preserving the

arbitrary restrictions on Comsat as a way to protect the IRCs from competition.

50. Finally, ITTWC notes that since we issued our 1982 Report and Order we have introduced three major new competitors into the overseas market: AT&T, The Western Union Telegraph Company, and Satellite Business Systems. ITTWC argues that, as a result, there is no need for additional entrants, particularly Comsat. We believe that decision is better left to potential entrants. We have already found that the international communications is growing rapidly and that it will support additional entry. If a potential entrant believes the market is too competitive, it will conclude that it will not be able to earn an adequate return and will elect not to enter. Users can benefit even if the entity decides not to enter, just from the fact that it is ready and able to enter. Our *Authorized User II* policy merely gives Comsat the chance to make that decision.

51. *Separate-Subsidiary Requirement.* Having concluded that the public interest would be served by allowing Comsat to offer end-to-end international communications services, we must now determine the proper structural framework for such an offering. In our 1982 Report and Order in this proceeding we required Comsat to provide end-to-end services through a separate subsidiary. *See* 90 FCC 2d at 1406. We must, here, decide whether we should again require such a subsidiary. Comsat does not challenge our 1982 decision to require a subsidiary for end-to-end services. It is concerned, however, by the apparent requirement that it form two such subsidiaries, one for earth-station services and a separate one for end-to-end services. Comsat argues that the requirement of two subsidiaries is inefficient and unnecessary. Comsat asserts that the earth-station subsidiary required in *Earth Station Ownership* will provide all the separation necessary to prevent anticompetitive conduct. Comsat notes that none of the other carriers who would be allowed to provide earth-station services are required to separate those operations from their end-to-end services and sees no reason why it should be treated differently. Rather, Comsat argues that in order to assure vigorous competition its earth-station subsidiary should not only be allowed but encouraged to provide end-to-end services.

52. We again conclude that we must require Comsat to separate its competitive end-to-end services from its monopoly INTELSAT and INMARSAT activities. Such separation will minimize any chance for improper cost allocations or cross subsidization of competitive activities and so will facilitate the implementation of our *Authorized User II* policy. We do agree with Comsat, however, that there is no need for two separate subsidiaries. The important point is to separate Comsat's monopoly from its competitive activities. There is no need to separate its competitive activities from each other. The existence of competition will assure that

Comsat cannot charge too much for earth-station or end-to-end services and separation from the World Systems Division will assure there are no monopoly revenues to subsidize any competitive offering. We thus have no objection to Comsat's providing both earth-station and end-to-end services through the same subsidiary. However, we require Comsat, within any multi-purpose subisidary, to maintain separate accounts for each line of business.[40]

53. *Delay of Implementation of our Authorized User II policy.* MCII and RCAGC have sought a delay in the implementation of our revised authorized-user policy. MCII argues that the Court of Appeals has required us to delay *Authorized User II, Direct Access* and *Earth Station Ownership* and to consolidate them into one rulemaking. RCAGC, on the other hand, asks us to delay *Authorized User II* until such time as Comsat has formed its earth-station subsidiary and the carriers have brought their earth stations into service. RCAGC argues that introduction of those stations is likely to take several years and that to allow Comsat to move ahead with its offer of satellite circuits immediately will give Comsat an unfair competitive advantage and largely undo the benefits of allowing independent stations. In this connection, RCAGC notes that it took four years for ESOC to get authorization and to construct the ESOC Roaring Creek, Pennsylvania, earth station — even though that application was unopposed — and argues that there is no reason to expect authorization of independent stations to take less time, since they undoubtedly will be contested.

54. We find no reason to delay the *Authorized User II* policy. We do not agree with MCII that the court required a consolidated rulemaking. The court held only that we must consider the *Direct Access* and *Earth Station Ownership* issues before implementing *Authorized User II* and to consider the impact of our decisions in those matters upon our analysis of the public-interest impact of *Authorized User II.* In *Direct Access* and *Earth Station Ownership* we considered the merits of those proposals. In our decision today we have considered the impact or decisions in those proceedings will have on *Authorized User II.* There is no need for yet another proceeding to reexamine the impact. With respect to RCAGC's argument concerning delay in authorizing earth stations, we find that Comsat will derive no unfair advantage from being able to offer earth-station service immediately. RCAGC's claim was premised on an assumption that our order in *Earth Station Ownership,* would dissolve ESOC and that Comsat would wind up as the sole owner of one or more of the existing ESOC stations. Since that is not the case, RCAGC's argument is moot. However, we should like to note that the only way Comsat could

[40] Comsat may also elect to place both its earth-station and end-to-end service activities in an existing subsidiary.

entrench itself as a supplier of earth station services would be if it were to engage in predatory pricing or other anticompetitive conduct. The Comsat earth station subsidiary will be subject to regulation. We have ample authority to correct any abuses. *Earth Station Ownership* directed the ESOC members to negotiate its future, but recognized that those negotiations may be lengthy and that the carriers may in the end decide to retain the ESOC consortium. To hold up the *Authorized User II* policy for such an uncertain period would unduly deny users the benefits of that policy. Rather, we believe the public interest requires us to move ahead on implementation of *Authorized User II* as rapidly as possible.

III. Other Issues

55. *A. Status of U.S. government as an authorized user.* We turn now to the additional issues raised by the respondents. In the first of those issues DoD argues that the U.S. government is a statutorily designated authorized user who may take both space segment and earth-station services directly from Comsat's World Systems Division. Therefore, according to DoD, we lack authority to require it to deal with a Comsat retail subsidiary for earth-station or any other service. DoD notes that it has previously "extensively" briefed its legal position in earlier stages of this proceeding and incorporates those arguments by reference.[41] DoD argues that the Court of Appeals may have affirmed the right of the Commission to determine which non-carrier entities may deal directly with Comsat, but it was silent on the issue of our power to restrict the U.S. government. DoD, therefore, requests us, irrespective of the policy we may adopt in *Direct Access, Earth Station Ownership* or *Authorized User II,* to make clear that the U.S. government is free to take either basic satellite transmission capacity or end-to-end services directly from the Comsat World Systems Division and that it is not limited to dealing with a Comsat subsidiary.

56. We note that the policy we have adopted today will give governmental and other non-carrier users broad access to Comsat service, either to the World Systems Division (for space-segment capacity) or to a Comsat subsidiary (for end-to-end and earth-station services). Due to the separate-subsidiary requirement, Comsat's World Systems Division will not own any earth stations and will therefore be unable to provide the package service that DoD now can obtain upon a "national interest" showing. The separate-subsidiary requirement is a limit upon Comsat and necessary to the implementation of our *Earth Station Ownership* and

[41] Petition of Department of Defense on behalf of the Federal Executive Agencies for Declaratory Ruling, filed December 4, 1979. Reply Comments of Federal Executive Agencies, in RM-3536, filed February 12, 1980; Comments of Federal Executive Agencies, CC Docket No. 80-170/RM-3536, filed August 12, 1980; and Reply Comments of Federal Executive Agencies, CC Docket No. 80-170/RM-3536.

Authorized User II policy. We cannot waive the requirement, even for governmental users, without seriously compromising the competitive program we have created. Since the same potential for competitive abuse exists whether dealing with governmental or private users, we believe that the public interest will be served by an evenhanded application of our policy.[42] We will therefore deny DoD's request. We do not see, however, why the government would be harmed by our separate-subsidiary requirement. The need to take earth-station service from an entity other than the World Systems Division should not introduce any significant inconvenience. Any inconvenience that does result should be more than offset by the fact that our policy will introduce competition (and presumably lower rates) into the provision of earth-station services. We anticipate that the sum of the charges for Comsat space segment and those for competitive earth-station services should be less than Comsat's current bundled charges.

57. With respect to DoD's statutory argument, we note that the Satellite Act does not distinguish between the Comsat World Systems Division and a Comsat competitive subsidiary. It merely states that all users, whether carriers, non-carriers or governmental, must have non-discriminatory access to the services of the corporation. *See* 47 U.S.C. § 721(c)(2). Our policy provides such non-discriminatory access. In our 1966 *Authorized User I* decision we established that the Satellite Act gives us the discretion to determine the scope of Comsat's public operations and to decide under what terms users may deal directly with Comsat. The Court of Appeals in *ITTWC v. FCC* affirmed that determination.

58. *B. Television-transmission Service.* We turn now to the request of the television networks for clarification of how television-transmission service fits into the general *Authorized User II* policy. The networks request continued authority to take space segment, earth-station and certain incidental services directly from the World Systems Division which our *SIN* decision now allows them to do. The networks note that our *SIN* decision was a waiver of our 1966 *Authorized User I* decision and that the Court of Appeals expressly upheld it. The networks further note that the court based its action on differences between television-transmission and other services (*i.e.*, the unique benefits to users of dealing directly with the World Systems Division and the small potential for

[42] DoD does not indicate any circumstances when dealing with a Comsat subsidiary would not satisfy U.S. governmental interests. However, we continue to recognize, as we did in 1966, that the U.S. government has unique national-defense and other national-interest concerns and that situations could arise where nothing but direct dealing with the World Systems Division would suffice. In such exceptional cases, where the government demonstrates a national-interest requirement, we would waive the separation requirement to allow the World Systems Division to construct an earth station especially for government use.

harm). The networks seek a finding that the separate-subsidiary requirements in *Earth Station Ownership* and *Authorized User II* do not affect our independent decision in *SIN* to allow users to obtain television-transmission service and other incidental services directly from Comsat's World Systems Division.

59. Under the policies we have adopted it is clear that space segment and earth-station/incidental services will be provided by different entities. The separate-subsidiary requirement in *Earth Station Ownership* forbids Comsat's World Systems Division to own or operate INTELSAT earth stations. A grant of the networks request would require us to abandon our *Authorized User II* and *Earth Station Ownership* policies. The separate-subsidiary requirements are integral parts of our policies and vital to their implementation and will not be waived without a substantial showing by the advocates of such a waiver. We thus conclude that we must retain the separation requirement for all end-to-end services, including television service.

60. As we indicated in the previous section concerning DoD, we see no reason why users of television-transmission service would be harmed by our separation requirement. Those users will be able to take space segment from the World Systems Division and earth-station services from the Comsat earth-station subsidiary or from another supplier of earth-station services. There is no reason to assume that the sum of the charges for end-to-end television service under our new policy will exceed Comsat's current bundled charges. Indeed, our introduction of competition into the provision of earth-station services will increase customer choice and, we anticipate, lead to lower overall charges. Of course, to the extent that network users were receiving incidental services at no charge, the subsidization will end.

61. *C. Additional Restrictions on Comsat.* The third additional issue is the request by IRI for additional restrictions on Comsat. IRI states that it generally supports our efforts to introduce greater competition into the international communications market and does not, in principle, oppose our policy to allow Comsat to enter the end-user market. However, IRI is concerned about the power Comsat enjoys as an "entrenched," dominant monopolist and argues that our pro-competitive policies can succeed only if Comsat is prevented from deriving any competitive benefit from its role as U.S. Signatory to INTELSAT. To this end, IRI suggests three specific restraints on Comsat to prevent competitive abuses: structural separation of Comsat's monopoly and competitive activities to prevent cross subsidization; direct control of Comsat's role as INTELSAT Signatory through provision for public input into INTELSAT deliberations; and improved control over Comsat's rates.

62. We generally agree with the thrust of IRI's arguments and have taken actions in the *Comsat Structure* and *Earth Station Ownership* proceedings, as well as in this proceeding, which we believe will satisfy most of IRI's concerns. We have required the structural separation (separate subsidiary) of Comsat's monopoly and competitive activities. We have also modified our information-flow procedures to assure timely availability of INTELSAT and INMARSAT documents and to provide for significant public input into INTELSAT and INMARSAT decisions. Finally, we recognize that the filing of unbundled, cost-based space-segment and earth-station rates is an important part of a revised, competitive earth-station policy. We shall carefully scrutinize Comsat's rates and take whatever actions are needed to assure that they are reasonable. The separation requirement in our *Earth Station Ownership* and *Authorized User II* policy, our recent *Comsat Structure Reconsideration* order,[43] and the requirement that Comsat file unbundled rates, are designed to facilitate that scrutiny.

IV. Conclusion

63. For all the reasons set forth above, we conclude that the public interest will be served by adoption of a policy broadening the class of those authorized to take service directly from Comsat. We continue to believe that allowing Comsat to lease space segment directly to users and enhanced-service providers and to provide earth-station and end-to-end services through a common-carrier subsidiary will benefit users by giving them increased choice and by putting competitive pressure upon the rates for leased-channel and exchange services. Our 1966 *Authorized User I* policy has unduly restricted customers, denied them the benefits of a well-financed and technologically-sophisticated supplier of satellite services, and has led to distortions of the international communications market. The public will be better served by giving users greater flexibility in meeting their communications needs and by giving them accurate cost information on which to base their choice.

64. We also conclude that any detriments likely to arise from adoption of our policy are not significant and that they will be outweighed by the benefits we anticipate. We see no reason to assume that the existing carriers will not be able under our policy to compete in the provision of any leased-channel or exchange services, and while it is possible that some of the IRCs' current customers may elect to lease space segment from Comsat or take earth-station or end-to-end services from a Comsat subsidiary, we do not anticipate that the IRCs will lose substantial amounts of revenue. Our policy will also allow a Comsat subsidiary and

[43] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, FCC 84-565, 99 FCC 2d ___, released December 11, 1984.

the service carriers to compete on a fair and equitable basis in which no carrier has an opportunity to abuse its position. Our policy may lead to lower rates for leased-channel or leased-channel-type services. We see no reason to assume that the IRCs will not be able to offer leased-channel service at a rate which will allow them to recover their costs and which is economically attractive to users — whether they provide those channels by means of INTELSAT satellite facilities or their own cable facilities.

65. Our companion policy in *Earth Station Ownership* allowing carriers to own their own earth stations, although not essential to the fair and equitable operation of our *Authorized User II* policy, will allow the carriers to realize any cost savings available from efficient operations and, thus, will enhance the ability of the carriers to offer satellite-based services. Allowing Comsat to offer satellite-based services will put pressure on the owners of cable facilities to keep their costs and the rates for cable-based services low.

V. Ordering Clauses

66. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 403, 404 and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 403, 404 and 410 (1976), and Sections 102, 201(c)(ii) and 401 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§ 701, 721(c)(ii) and 741 (1976), that the proposed, modified authorized-user policy in CC Docket No. 80-170 is, as provided for above, MADE FINAL.

67. Pursuant to Section 605(b) of the Regulatory Flexibility Act 5 U.S.C. §§ 605, IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because the authorized-user policy, and the instant modification thereof, is a rule of particular applicability to Communications Satellite Corporation and is, hence, not subject to the Regulatory Flexibility Act. *Id.* at §601(2);

68. IT IS FURTHER ORDERED that, international communications common carriers may file revisions to their tariffs to offer rates separately for international communications services provided solely by submarine cable facilities and for services provided solely by INTELSAT satellite facilities, or may file one composite rate for such services which reflects an average of the carriers' cable and satellite facility costs;

69. IT IS FURTHER ORDERED that the motions of MCI International, Inc. and TRT Telecommunications Corporation filed on July 9, 1984, requesting acceptance of late-filed comments in this proceeding are GRANTED;

70. IT IS FURTHER ORDERED that the request of MCI International, Inc., for reopening of the Commission's inquiry in CC Docket No. 80-540 (*Direct Access*) and consolidation of that proceeding with the instant proceeding, CC Docket No. 80-170 and with the Commission's rulemaking

in CC Docket No. 80-540 (*Earth Station Ownership*) and with the Commission's rulemaking in CC Docket No. 80-634 (*Comsat Structure*) for unified resolution is, for the reasons set forth above, DENIED;

71. IT IS FURTHER ORDERED that the request of RCA Global Communications, Inc., to delay implementation of the policies adopted in this proceeding is hereby DENIED;

72. IT IS FURTHER ORDERED that the policies adopted herein are effective immediately;

73. IT IS FURTHER ORDERED that CC Docket No. 80-170 is hereby TERMINATED;

74. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause this Second Report and Order to be published in the Federal Register and shall mail a copy of this decision to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

* Appendix may be seen in FCC Dockets Branch, Room # 239, 1919 M Street, N.W. Washington, D.C.

Common Carrier, Interconnection, Customer-Provided Equipment
Common Carrier, Interconnection, Duty To Interconnect
Private Branch Exchange-Sharing

Two unaffiliated customers, located in adjacent buildings, may share the use of a private branch exchange where each customer continues to subscribe separately to local telephone service. The mere furnishing of terminal equipment is not communications service.
—*Com Services, Inc.*

Common Carrier Connecting

A telephone company may not enforce its tariff or invoke state law in such a manner as to interfere with a customer's right to connect terminal equipment to the telephone network, absent a showing that such connection would cause harm to the network. The Commission has remedial powers to award damages, where appropriate, against any carrier.
—*Com Services, Inc.*

FCC 85-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Com Services, Inc.	
Complainant	
v.	
The Murraysville Telephone Co.	
Defendant	File No. E-80-20
Hamill Manufacturing Co.	
Complainant	
v.	
The Murraysville Telephone Co.	
Defendant	File No. E-81-10

Memorandum Opinion And Order

Adopted January 30, 1985; Released February 4, 1985

By the Commission:

1. Before us is an application filed by Murraysville Telephone Company (Murraysville) seeking review of an order entered by the Chief, Common Carrier Bureau which denied reconsideration of an earlier Bureau order granting the formal complaint of Com Services, Inc. (Com Services) against Murraysville.[1] Also before us is a formal complaint against Murraysville filed by Hamill Manufacturing Co., (Hamill) a customer of Com Services, seeking damages arising from the same cause of action.[2] For the reasons discussed below, we deny the application, and grant Hamill's complaint against Murraysville.

Background

2. The facts are largely undisputed. Hamill and Carnegie-Mellon Institute are customers of Com Services, a company engaged in the sale and installation of telephone terminal equipment. Murraysville is an independent telephone company. Prior to the dispute giving rise to these complaints, Murraysville provided local exchange service and PBX equipment to Hamill. The Murraysville PBX was located on Hamill's premises with extensions serving a portion of Hamill's business located in an adjacent building also owned by Hamill. On March 20, 1980, Carnegie-Mellon began leasing a portion of Hamill's second building. Murraysville installed two PBX extensions in that building as a "temporary courtesy" pending Carnegie-Mellon's response to Murraysville's proposal to provide Carnegie-Mellon with customer premises equipment.

3. The instant dispute arose when Hamill chose to contract with Com Services for a PBX to replace the PBX provided by Murraysville. Under the arrangement Com Services proposed, both Hamill and Carnegie-Mellon would order separate local exchange service from Murraysville. The exchange service was to terminate at a PBX to be located in Hamill's main building. Carnegie-Mellon's offices in the adjacent building were to be connected to the PBX by extension lines. The PBX was to route incoming calls on Hamill's and Carnegie-Mellon's lines to stations serving their respective offices. Further, if there were no answer on a Carnegie-Mellon line, the call was to be answered by Hamill's PBX operator. The proposed arrangement would also have permitted employees of Hamill

[1] Com Services Inc. v. Murraysville Telephone Co., (by the Chief, Common Carrier Bureau, unpublished) released December 31, 1980, *recon. denied*, 87 FCC 2d 664 (1981).

[2] The parties were ordered to file briefs on the issue of damages. *See* para. 13 *infra*.

and Carnegie-Mellon to communicate with each other directly through the PBX without accessing the Murraysville local exchange.

4. After being advised of this proposal, Murraysville, on March 24, 1980, tendered a letter to Hamill stating the following:

> Our company has examined the federal regulations governing the interconnection of customer-owned equipment and Pennsylvania public utility regulations, and we have concluded that your providing PBX operator service, wiring, and extension telephones to another company is not an acceptable arrangement.
>
> Although your PBX will have the capability to segregate your lines from the Carnegie-Mellon lines, and that [sic] each user could be restricted from accessing each other's lines, you are not a licensed carrier and therefore cannot extend telephone lines to another premise and provide the wiring and telephones to serve another company which has no corporate connection with Hamill Manufacturing Company. (*Complaint*, Attachment A) Murraysville repeated this position in a letter to Hamill dated April 22, 1980, responding to Com Services' request for service to Carnegie-Mellon. In that letter Murraysville also stated its willingness to install whatever service Carnegie-Mellon required, provided that the lines terminated within the building occupied by Carnegie-Mellon and that Carnegie-Mellon's customer premises equipment would be completely separate from Hamill's.

5. The cutover to the Com Services' installed PBX occurred on May 16, 1980. Since Murraysville had not provided the separate lines requested for Carnegie-Mellon, Com Services programmed the PBX to permit Carnegie-Mellon access through Hamill's lines. Due to the arrangement between Hamill and Carnegie-Mellon, Murraysville threatened termination of Hamill's service. As a result, Com Services was compelled to install a second PBX for the exclusive use of Carnegie-Mellon.

6. Com Services' complaint, disposed of by the Bureau and for which Murraysville now seeks review, alleged a violation of Section 201(a) of the Communications Act in that Murraysville's refusal to provide the requested lines to Hamill and Carnegie-Mellon constituted a denial of access to the interstate network.[3] Com Services argued that the proposed arrangement complied with both Part 68 of this Commission's Rules governing interconnection of foreign attachments and the American Telephone and Telegraph Company's Tariff FCC No. 263 governing message telecommunications services (MTS), in which Murraysville concurred for the provision of interstate service at the time the complaint was filed.[4] Therefore, it reasoned that Murraysville's refusal to provide interconnection violated Section 201(a) of the Communications Act.

7. In response, Murraysville contended that Part 68 was not dispositive on the question of whether a customer may connect its own terminal

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[3] 47 U.S.C. §201(a) in pertinent part imposes a duty on every common carrier engaged in interstate or foreign communications by wire or radio "to furnish such communication service upon reasonable request therefor . . ."

[4] Murraysville is now an issuing carrier in the Exchange Carriers Association, Tariff FCC No. 1.

equipment to the telephone network for the purpose of offering telephone service to an unaffiliated customer. In this regard, Murraysville urged that Hamill would be in violation of Pennsylvania law by offering telephone service to Carnegie-Mellon without authorization or certification as a public utility from the Pennsylvania Public Utility Commission. Finally, Murraysville argued that the proposed arrangement would violate its own state tariffs which, *inter alia* restrict the use of business service to the subscriber, its agent and representatives and require facilities furnished by a customer to be connected solely with Murraysville's facilities.

8. The Bureau's *Orders* below found Murraysville's arguments unpersuasive. It explained that tariff provisions restricting the use of customer-provided terminal equipment have time and again been found unlawful both by this Commission and the courts where they infringe upon the customer's right to use its telephone in ways which are privately beneficial without being detrimental to the telephone network. *See, Hush-a-Phone Corp. v. FCC,* 238 F.2d 266 (1956); *Carterfone,* 13 FCC 2d 420 (1968), *recon. denied,* 14 FCC 2d 571 (1968); *AT&T Foreign Attachment Tariff Revisions,* 15 FCC 2d 605 (1968); *Telerent Leasing Corp.,* 45 FCC 2d 204 (1974) *(Telerent), aff'd sub nom. North Carolina Utilities Commission v. FCC (NCUC I),* 537 F.2d 787 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027 (1976); *North Carolina Utilities Commission v. FCC (NCUC II),* 522 F. 2d 1036 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977). The Bureau further took notice of the Commission's right to intercede where local tariffs interfere with federally mandated interconnection policies. *See NCUC II Supra* at 1050; *Diamond International Corp. v. AT&T,* 70 FCC 2d 656 (1979), *aff'd Diamond International Corp. v. FCC,* 627 F.2d 489 (D.C.Cir. 1980). *See also, New York Telephone Co.,* 76 FCC 2d 349 (1980), *aff'd New York Telephone Company v. FCC,* 631 F.2d 1059 (2d Cir. 1980); *Dept. of Defense v. AT&T,* 80 FCC 2d 287 (1980); *Heritage Village Church,* 88 FCC 2d 436 (1982), *aff'd sub nom. Ft. Mill Telephone Co. v. FCC,* 719 F.2d 89 (4th Cir. 1983). Applying these principles, the Bureau concluded that Murraysville had unreasonably interfered with the customers' beneficial use of their own terminal equipment in violation of Section 201(a) of the Act. *Cf. Edwards v. Nevada Bell,* 74 FCC 2d 322 (1979).

9. As a separate matter, the Bureau rejected Murraysville's contention that Hamill would become an uncertificated common carrier under the arrangement proposed by Com Services. Here it observed that Murraysville would continue to provide the telephone service, as opposed to Hamill. Moreover, the PBX would have the capability to segregate Hamill's lines from Carnegie-Mellon's and it would be programmed to maintain separation of telephone service between the two companies.

Com Services, Inc. v. The Murraysville Telephone Co., 87 FCC 2d *supra* at 666-67. Therefore, the Bureau determined that the mere furnishing of terminal equipment standing alone is not a common carrier service. *Amendment of Part 64.702 of the Commission's Rules and Regulations*, (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *recon.*, 84 FCC 2d 50 (1981), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Public Service Commission v. FCC*, 103 S. Ct. 2109 (1983). The Bureau found Hamill's plan to extend a line from the PBX to Carnegie-Mellon's premises did not alter this conclusion. When customers use their own multi-line terminal equipment, *i.e.* a PBX, they may also install their own premises wiring as part of such equipment. The telephone company's responsibility ends at the point of connection to the customer premises equipment, absent a showing of harm to the network. *Com Services Inc. v. The Murraysville Telephone Co., supra; Ft. Mill Telephone Co. v. FCC, supra.*[5]

Discussion

10. In its application for review, Murraysville contends only that the Bureau misapplied the *Telerent* decision, *supra*, in determining that state regulations may not be applied in any manner which interferes with the federally recognized right of telephone subscribers to attach and use their own terminal equipment. *Com Services, Inc.*, 87 FCC 2d at 666. According to Murraysville, *Telerent* holds that state laws concerning the certification of common carriers may properly preempt the federal terminal equipment registration program to prohibit interconnection by an uncertificated common carrier. To the extent, then, that the Bureau ignored Pennsylvania law prohibiting one entity (in this case Hamill) from furnishing telephone service through a PBX to another entity (here Carnegie-Mellon) without first obtaining state certification as a public utility, Murraysville asserts that the rulings below must be set aside.

11. Murraysville's reliance on *Telerent* is misplaced. Applicant is correct that *Telerent* recognizes a legitimate state interest in the effect of our decisions in common areas of regulation and specifically leaves open the possibility of state intervention with respect to the impact of interconnection on the quality of telephone service, intrastate rate structures, or revenue requirements subject to its jurisdiction. Murraysville nonetheless ignores that decision's clear pronouncement that state

[5] The Commission recently adopted a definition of the demarcation point where customer-owned wiring connects with telephone company wiring. It defines the demarcation point as being on the customer's side of the telephone company's protector or equivalent device in accordance with reasonable and non-discriminatory local telephone company practices. Amendment of Part 68 Concerning Connection of Telephone Equipment, Systems and Protective Apparatus, CC Docket No. 81-216, FCC 84-182, released May 18, 1984.

action may not "derogate the interstate ruling" in favor of interconnection. *Telerent,* 45 FCC 2d at 221. The Commission's "interstate" policy expressed in *Telerent,* oft repeated in later holdings, is that interconnection of customer provided terminal equipment must be permitted absent a showing that the telephone network or employees operating and maintaining that network will be harmed by that use. *See, Mebane Home Telephone Co. v. FCC,* 535 F.2d 1324 (1976). In the instant case, Murraysville made no attempt to justify its refusal to permit the PBX sharing arrangement through a showing of harm.

12. Nor has applicant shown that state law was improperly disregarded by the Bureau's decision. Neither the state itself nor the Pennsylvania PUC has made a claim that the arrangement between Com Services and Hamill constitutes a communication service requiring its certification[6] or that the PUC's legitimate certification objectives would be undermined as a consequence of the Bureau's ruling. Accordingly, we conclude that the Bureau's action below was in full conformity with established interconnection policies.

Damages

13. We next address the issue of damages stemming from Murraysville's refusal to permit Hamill and Carnegie-Mellon to use a PBX in the manner proposed by Com Services. In the December 31, 1980 *Order,* paras. 18, 22, the Bureau left undecided whether Murraysville, if assumed to be a connecting carrier under Section (2)(b)(2), 47 U.S.C. § 152(b)(2), should be subject to the damages provisions of the Act, 47 U.S.C. § § 206 and 207. Section 2(b)(2) of the Act defines a connecting carrier as one "engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier." The Section further provides that connecting carriers are subject only to Sections 201 through 205 of the Act, 47 U.S.C. § § 201-205. Two circuit courts have interpreted this statute differently. The Sixth Circuit has found connecting carriers are liable for damages. *Ward v. Northern Ohio Telephone Co.,* 300 F.2d 816 (6th Cir. 1962), *cert. denied,* 371 U.S. 820 (1962). In *Comtronics v. Puerto Rico Telephone Co.,* 553 F.2d 701 (1st Cir. 1977), the First Circuit has held connecting carriers are not liable for damages. Of the two cases, we find the *Ward* decision reached a more reasoned result than *Comtronics.* We do not believe that

[6] As we noted in para. 9 *supra,* Murraysville will continue to supply transmission facilities to Hamill and Carnegie-Mellon through separate trunks. Accordingly, the proposed arrangement will not constitute resale or shared use of MTS. *See* Com Services, Inc. v. Murraysville Telephone Co. (by the Chief, Common Carrier Bureau, unpublished) released December 31, 1980, para. 15. *See also* Registration of Coin Operated Telephones, FCC 84-270, released June 25, 1984, at para. 12 and n.24.

Congress intended to permit any carrier to violate Sections 201-05 of the Act and leave the damaged party with no remedy under the Communications Act.

14. By way of background, Ward, an operator of a radio station, brought an action under Section 201(a) against the Northern Ohio Telephone Company as a result of the latter's refusal to furnish telephone lines across state boundaries to the radio station. Ward also sought damages under Sections 206 and 207 of the Act. The telephone company asserted in defense that as a connecting carrier it was exempt both from the duty to furnish interstate facilities to the radio station and from liability for damages for its refusal to do so. In rejecting this argument the Court reasoned:

> All of the provisions of the Act, as well as the subject matter with which it is concerned, regarding the duties and liabilities of such a carrier as appellee telephone company, would be futile without the remedial provisions setting forth a right to damages for violation thereof and the method of enforcing such right. It would be unreasonable to hold that appellee company is subject to the duties and liabilities set forth in the statute but that it is not subject to the provisions for enforcement of the rights which the company may see fit to violate.

Ward, F.2d at 820. *See also, Fallon Travelodge v. Churchill County Telephone and Telegraph System,* 14 FCC 2d 972, 974 (1968); *DOD v. General Telephone Co. of the Northwest,* 22 FCC 2d 70, 72 (1970).

15. Nevertheless, the First Circuit in *Comtronics* has reached a different result. There, the Court ordered Puerto Rico Telephone Company (PRTC), a connecting carrier, to permit connection of customer-provided equipment. However, it declined to award damages to the complainant due to PRTC's status as a connecting carrier. We find several inconsistencies in that decision. First, the Court cited the *Ward* case, the only other judicial opinion on the subject, but made no effort to distinguish the clearly contrary decisions. *Comtronics,* 553 F.2d at 704. Second, the Court noted that ". . . the enforcement scheme of the Communications Act vis-a-vis connecting carriers might be seriously flawed by the absence of a damages remedy." *Id.* at 705. Nonetheless the Court reasoned that its decision was compelled by "a clear legislative intent to preclude such a remedy." *Id.* However, the Court's discussion of the legislative history cited no statement by Congress in support of its holding.

16. We agree with the *Ward* decision, which the Commission followed in *Fallon Travelodge* and *DOD, supra,* and the dissent in *Comtronics* that Congress intended every carrier to be subject to the damage provisions set out in Sections 206-07 of the Act. As we decided in *Fallon Travelodge,* this Commission has remedial powers to award damages where appropriate, against any carrier. We recognize that the legislative history of Section (2)(b)(2) reflects Congress' intent to protect financially-

weak, rural telephone companies from excessive government regulation, such as burdensome accounting and recordkeeping requirements.[7] 78 Cong. Rec. 8846 (May 15, 1934) (remarks of Sen. Clark). Nevertheless, as noted above, there are no specific statements in the legislative history that Congress intended to exempt connecting carriers from damages liability. Absent strong support to the contrary, it would be unreasonable and illogical to assume that Congress intended to create a statutory scheme whereby a carrier would be subject to Sections 201-05 of the Act yet be exempt from damages resulting from a violation of these requirements. Moreover, this Commission has the expertise needed to determine particular violations of the Communications Act and to award damages where necessary. We therefore conclude that connecting carriers as well as fully-subject carriers are liable for damages for complaints arising under those sections of the Communications Act to which connecting carriers are specifically subject.[8]

17. Having determined that Murraysville is in violation of the Act as well as subject to the damages provisions therein, we find that Com Services and Hamill are entitled to some relief. The parties should be able to reach a mutually agreeable settlement of their claims. If they fail to do so, Com Services and Hamill may file a separate request for damages with the Commission alleging in detail all damages sought. We will then conduct whatever proceedings are necessary to ascertain damages.

18. Accordingly, IT IS ORDERED, That the application for review filed by the Murraysville Telephone Company, FCC File No. E-80-20 IS DENIED.

19. IT IS FURTHER ORDERED, That the complaint filed by Hamill Manufacturing Co. against The Murraysville Telephone Company, FCC File No. E-81-10 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[7] We note that Sections 202, 203 and 205 contain forfeiture provisions for violations for those statutes. Section 201(a), which Murraysville violated, does not even contain this minimal penalty.

[8] Connecting carriers may be subject to other penalties and/or enforcement actions, in addition to or in lieu of damages, for violations of the Communications Act.

Affidavit Need for
Candor
Evidence, Additional
Financial Qualifications, Loan Commitment, Terms of
Site Availability

Review Board orders that record be supplemented with detailed information and affidavits relating to both the financial qualifications of and transmitter site availability of the winning comparative applicant below before it can decide whether or not to affirm *ID* or remand for further hearing.
—*Dutchess Communications Corp.*
BC Docket No. 82-442

FCC 85R-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Dutchess Communications Corp. Poughkeepsie, New York	BC Docket No. 82-442 File No. BPH-810522AN
James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company Poughkeepsie, New York	BC Docket No. 82-443 File No. BPH-810925AQ
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1985; Released: March 12, 1985

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Dutchess Communications Corp. (Dutchess) and Hudson Valley Communications Company (Hudson Valley) for authority to construct a new FM

broadcast station to operate on Channel 221 at Poughkeepsie, New York. The applications were designated for consolidated hearing (along with two other applications subsequently dismissed) by the Chief, Broadcast Bureau (now Mass Media Bureau) pursuant to delegated authority. *See Hearing Designation Order,* 47 Fed. Reg. 32787, published July 29, 1982. In an *Initial Decision (I.D.),* FCC 84D-69, released October 1, 1984, Administrative Law Judge Byron E. Harrison (ALJ) granted Hudson Valley's application. The proceeding is now before the Review Board on exceptions filed by Dutchess and Hudson Valley's reply. Oral argument on the case was heard by the Review Board on February 1, 1985.

2. Our review of the record and our consideration of the arguments of the parties at oral argument convince us that this case cannot be decided on the basis of the material now before us. Before we can determine the correctness of certain of the ALJ's rulings or hold that the case must be remanded for further evidentiary hearing on substantial and material questions of fact, the record must be supplemented by Hudson Valley in the manner explained hereinbelow. *See Garrett, Andrews and Letizia,* 88 FCC 2d 620, 623-624 (1981).

3. *Bank East Loan.* In response to a financial issue laid against Hudson Valley, *I.D.,* Fdgs, para. 4,[1] it amended its application on January 20, 1983 to include revised construction cost estimates and a letter of January 14, 1983 from Bank East of Manchester, New Hampshire.[2] The letter further enumerates five conditions on the loan, the two most under contention here being "the pledging of acceptable collateral" and the obtainance of "acceptable loan guarantees" from Hudson Valley princi-

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[1] The ALJ added this issue by *Memorandum Opinion and Order,* FCC 82M-3771, released November 29, 1982. Hudson Valley had originally estimated its construction and 3-month operating costs at $92,400 ($2,400 cash, $90,000 bank loan. *Hearing Designation Order,* 47 Fed. Reg. 32787 (July 29, 1982). Because no support for its financing was submitted with its application, the Commission required Hudson Valley to "certify" that it had secured adequate financing. *Id.,* at para. 4. Such "certification" was made on August 23, 1982. *See* Dutchess Exceptions at 14-15. However, it appears that Hudson Valley's "certification" may have been incorrect, for the applicant was allegedly relying on one Dr. William Smith (brother of an applicant principal) to help arrange the financing. *Id.,* at 16. But, it is asserted, Dr. Smith discovered that the intended bank posed the "requirement of a commitment fee which Hudson Valley decided was unacceptable and Hudson Valley decided to seek a loan from a bank which did not require a commitment fee." *I.D.,* Concls. para. 20. Facing a financial issue, but with no bank loan, Dr. Smith advised a Hudson Valley principal to contact Bank East (Tr. 605), and thus our story begins.

[2] Although Bank East is solely a New Hampshire entity, the loan is for a Poughkeepsie station. Further, two of Hudson Valley's principals reside in Springfield Gardens, N.Y., *I.D.,* Fdgs. paras. 38, 48, while the other two (the Carpenters) reside in Brooklyn, N.Y. and Englewood, N.J., respectively. *Id.,* at paras. 41, 43. It is undisputed that none of the Hudson Valley principals had ever had prior contact or dealings with Bank East.

pals.[3]

4. However, it develops that (1) "[n]one of the principals of Hudson Valley had ever dealt with Bank East before"[4]; (2) "Hudson Valley never filed a written loan application with the bank"[5]; and (3) while a Hudson Valley principal claims that she had "informally" applied for the loan by long-distance telephone and given the bank an "oral" financial statement,[6] the principals "never heard from the bank after sending it their financial information" some weeks later.[7] Hudson Valley Reply at 17-20.

5. Hudson Valley contends that the ALJ was correct in summarily crediting the Bank East letter and in not exploring the matter of whether its principals could supply the bank with its requisite collateral and personal loan guarantees. It relies heavily on language in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 836 (Rev. Bd. 1981) (subsequent history omitted), where we wrote:

> A bank loan commitment letter, by itself, is sufficient to establish the availability of a bank loan, absent a showing which questions the validity of the letter or the bank's ability to make the loan.

However, Hudson Valley begs the question, because the circumstances surrounding the dispatch of the Bank East letter raise more than a few questions about the validity of the commitment. For example, although Hudson Valley asserts that it holds a secure commitment from a New Hampshire bank with whom none of the principals had ever dealt based on an "informal," unwritten application by long-distance telephone, the "financial statements" later supplied by its principals cause us to ponder upon just what Bank East was relying when it issued its letter of January 14, 1983.[8]

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[3] Hudson Valley Exh. 7 at 2.

[4] Dutchess Exceptions at 17 (*citing* Tr. 391, 605).

[5] *Id.*, at 16 (*citing* Tr. 387).

[6] *Id.*, at 16-17.

[7] *Id.*, at 17 (*citing* Tr. 621, 828).

[8] Without intending to unduly embarrass any individual, the "financial statements" allegedly submitted *post hoc* to the bank are infirm. Thus, one principal wrote to the bank and showed:

Position: Development Coordinator
Annual Salary: $14,000.00
Savings: 300.00
Assets: Life Insurance valued at $10,000.00
Liabilities: Educational Loan: $8,715.00

$14,000.00	Salary
$10,000.00	Insurance
300.00	Savings
$24,300.00	
- 8,715.00	Loan
$15,585.00	

6. The Commission has gone beyond the surface of a bank commitment letter where a bank conditions a loan on "acceptable collateral" and "[t]here is no evidence in the record as to what collateral would be acceptable to the bank." *Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979). It appears that the proposed station would not suffice as collateral for the $175,000 loan since (a) Hudson Valley's total projection for construction, land *and* 3-months' operating cost is only $115,290 [9]; and (b) "Hudson Valley proposes to lease all of its broadcast equipment from Amvest Leasing and Capital Corp."[10] Given the data reflected in the "financial statements" of the principals (such as they are, *see supra* note 8), we believe that the supplementation of the record is vital.

7. Hudson Valley will therefore supply an affidavit from the officer at Bank East responsible for the January 14, 1983 letter[11] there explaining fully (1) why he made a $175,000 loan commitment by telephone to unknown individuals without written application or accurate financial statements [12]; and (2) in specific terms which identify the assets relied

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Harmony Exh. 19. Insofar as we can determine, that principal had assets of $300 and liabilities of $8,715. Another claimed assets of $256,235 (including unsupported value of real estate owned jointly with a non-principal spouse) and liabilities of $71,645. But $75,000 of even those claimed assets are face value amounts of life insurance policies which - barring the unspeakable dread - have no present worth. Harmony Exh. 20. The other two principals (married) showed a combined salary of $27,000 per year and three pieces of real estate alleged - without support - to be worth $113,000. But, *aside* from mortgage liabilities, the principals also showed these debts:

Master Charge:	$ 900.00
Home Investment Loans:	$ 1,200.00
Payments owed on Piano:	$ 813.00
Sears Account:	$ 400.00

Hudson Valley Exh. 9.

[9] *I.D.*, Fdgs. para. 22.

[10] Dutchess Exceptions at 18 (*citing* Tr. 607).

[11] The letter appears to be signed by the individual colorfully described on the letterhead as:

W.N. "Wink" DeWitt
Chairman and C.E.O.
603-624-6192

[12] We cannot blink the assertion of Dutchess that the letter was no more than an accommodation to Dr. Smith — a wink from "Wink," they think. However, the Board is not unfamiliar with the breed of very "accommodating" bankers. *See, e.g., California Broadcasting Corp.*, 56 RR 2d 1319 (Rev. Bd. 1984).

upon, what Bank East will consider the "acceptable collateral" and "loan guarantees" required by the letter. We will further require the Hudson Valley principals to submit complete and accurate personal financial statements[13] and a detailed projection of estimated construction and 3-months' operating costs, along with the source of such funds.

8. *Transmitter Site.* By the *Memorandum Opinion and Order* referenced *supra* note 1, the ALJ added the following issues:

> To determine if Hudson Valley possesses the financial qualifications to purchase its proposed transmitter site and to make such transmitter site ready for its intended use.
>
> To determine whether the transmitter sites as proposed by Dutchess, Hudson Valley, and Wappingers Falls are suitable in terms of physical characteristics for the intended use.

It appears that the first aspect of the foregoing arose because Hudson Valley had represented in its "application that it would lease its transmitter site at a cost of $2,250 for the first three months of operation." Hudson Valley Reply at 21. But, much as Hudson Valley asserts that it had relied on a (non-principal) kin of a principal, Dr. Smith, to secure their financing, they relied on the brother of another principal, Mr. Richard Moore, to generally secure the transmitter site.[14]

9. It turns out, however, that by letter of September 18, 1982, the owner wrote to the Hudson Valley principals (specifically Dr. Ann Carpenter) indicating only a "willingness to negotiate with Hudson Valley Communications Company the *sale* of five (5) acres of land."[15] The landowner's letter was supplied by a competing applicant along with the owner's affidavit averring that he expressly informed Hudson Valley that he "would not lease" the land.[16] Nonetheless, Hudson Valley asserts that it continued to believe it could lease the land for $750 per month, a figure conjured by Hudson Valley apparently *ex nihilo.*[17]

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[13] From the exhibits, it is evident that the Hudson Valley principals are quite unsophisticated in financial matters. We do not intend to criticize, but will require that the financial statements supplied in response hereto be prepared and attested to by a certified C.P.A. Additionally, to the extent that the principals claim real estate assets, these assets should be supported by competent appraisals, showing all ownership interests and encumbrances.

[14] Hudson Valley Reply at 21-26.

[15] Dutchess Exceptions at 21 n.14 (emphasis in original).

[16] *Id.* Hudson Valley rejoins that the landowner's refusal to lease the land was conveyed to Mr. Richard Moore, Hudson Valley Reply at 23 n.13, but that Mr. Moore did not retransmit this information to the Hudson Valley principals. *Id.*, at 23-24. In fact, counsel for Hudson Valley claims that the applicant was unaware of the landowner's terms until a petition to enlarge was filed. Tr. of Oral Arg. at 2544. Until then, it is claimed, Hudson Valley was "confused." Hudson Valley Reply at 22.

10. The Board has made clear that where a site owner expressly conditions the terms under which the owner will make the land available, an applicant is not at liberty to disregard those conditions or to place a creatively inconsistent interpretation thereon so as to continue to claim the site. *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495 (Rev. Bd. (1984); *Valley FM Radio*, 57 RR 2d 420 (Rev. Bd. 1984); *Shoblam Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984 (Comm'n).[18] Still, Hudson Valley asserts that there was no lack of candor with the Commission because — in response to request for a misrepresentation issue — "Dr. Carpenter stated in her affidavit attached to Hudson Valley's Opposition, that Hudson Valley had adequate resources to purchase the site rather than lease it."[19] But Dutchess argues (1) that whether or not Hudson Valley's *later* financing would have covered the cost of purchase, the failure to timely advise the Commission that it could not lease its site was deliberate, to wit[20]:

> By reducing the cost of obtaining a transmitter site from the owners' price of $35,000 to the misrepresented rental cost of $2250, Hudson Valley was able to project a total cost of operation of only $74,240, well within the $90,000 in bank financing proposed in its application. The $32,750 difference between the two costs would have increased Hudson Valley's total cost by about 44%, a substantial increase in the amount for which it was seeking bank financing. Thus, ample motive existed for representing that the transmitter site could be obtained under lease, rather than purchased.

And (2), insofar as Hudson Valley maintained — and continues to maintain — that its land cost would be an "estimated" $750 per month, there was no alternative provision in the Hudson Valley proposal for a down payment on the land or mortgage payments.[21]

11. Before we prematurely make any assessment of Hudson Valley's candor, we will permit it to supplement the record with (a) an affidavit from the transmitter site landowner specifically setting forth the terms and conditions under which the owner then proposed, and now proposes, to sell the land to Hudson Valley; and (b) an affidavit from the Sleight

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[17] Anent the rental estimate, Hudson Valley asserts that "Dr. Carpenter is a professional woman with a chiropractic practice in New York and has taken part in activities in the Poughkeepsie area. Presumably she had some familiarity with rental fees in the area." Reply at 22 (record citations omitted). We cannot share the "presumption" that an Englewood, N.J. chiropractor would be generally conversant with rental fees for raw acreage "on the top of Vervalin Mountain in Poughkeepsie, New York." *I.D.*, Fdgs. para. 7.

[18] An appeal of *Shoblom* is pending *sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir.).

[19] Hudson Valley Reply at 24-25.

[20] Dutchess Exceptions at 24.

[21] *Id.*, at 22.

family land owner specifically setting forth the terms and conditions under which it would convey rights to the land necessary to access the Vervalin Mountain transmitter site, *including* that landowner's estimated cost of the road across his land necessary to access the site.[22]

12. ACCORDINGLY, IT IS ORDERED, That Hudson Valley Communications Company SHALL BE AFFORDED 20 days from the release date hereof to supplement the record in accordance with this opinion, and that Dutchess Communications Corp. SHALL BE AFFORDED 10 days from the date of such supplementation to file comments thereon.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[22] This matter is discussed more fully in the initial decision, where it is explained that the owner of the Sleight family land testified that he would permit the use of his land "to anyone who would build a public road at a cost of $240,000 to $320,000." *I.D.*, Concls. para. 10. Ignoring the landowner, the ALJ instead credited the estimate of Hudson Valley's Dr. Carpenter that a gravel road would cost $3,400. *Id.*, para. 11. There is no evidence that the Sleight family would accept a $3,400 gravel road in return for the prescriptive right necessary to access the mountaintop transmitter site. An applicant must show the ability to meet the demands of one whose land is necessary for its proposal. *South Florida Broadcasting Co., Inc., supra.*

Cordless Telephones
Radio Frequency Device, Authorization

Order Granting Limited Waiver adopted permitting continued production of duplex 49 MHz cordless telephone until July 1, 1985. New rules call for cordless telephone base units to operate on frequencies near 46 MHz and portable handsets to operate near 49 MHz. Order grants nine-month extension of time to continue manufacture of 49 MHz cordless telephones utilizing frequencies in 49 MHz band for both base unit and portable handset. —*Electra Co.*

FCC 85-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of

Electra Co. petition for extension of time to produce duplex 49 MHz cordless telephones

ORDER GRANTING LIMITED WAIVER

Adopted: January 8, 1985; Released: January 16, 1985

BY THE COMMISSION:

1. Electra Co. has filed a petition for waiver of the requirements in Part 15, to permit it to continue to produce its duplex 49 MHz cordless telephone for 9 months beyond the required manufacture termination date of October 1, 1984. The petition was placed on public notice on October 4, 1984. This *Order* grants the requested relief.

2. On December 22, 1983, the Commission adopted a *Report and Order* in General Docket 83-325, 49 FR 1512, January 12, 1984, establishing interim provisions for cordless telephones on ten pairs of frequencies in the 46 MHz and 49 MHz bands. Cordless telephones each utilize two frequencies, so that two-way conversation can be carried on in the same manner as a conventional wired telephone. The new frequencies for cordless telephones were made available as of February 15, 1984, and all cordless telephones manufactured after October 1, 1984, were required to conform to the new rules. See paragraphs 31 and 32 of the *Report and Order* in General Docket 83-325 and Section 15.117(b) of the Rules.

3. Prior to adoption of the new rules, cordless telephones operated under general provisions for low power transmitters in Part 15. Most units utilized frequencies in the vicinity of 1.7 MHz to transmit from the cordless telephone base unit to the portable handset.[1] The portable handsets transmitted back to the base unit using one of five frequencies near 49 MHz available for general purpose use under Section 15.117. Electra had developed a technique to permit operation on two closely spaced frequencies in the 49 MHz band. Thus, the Electra cordless telephones utilized 49 MHz frequencies for transmission in both directions.

4. Although the 49 MHz frequencies utilized by the Electra cordless telephones are among those made available under the new rules, they do not conform to the frequency pairing scheme prescribed in the regulations. The rules specify 10 cordless telephone channels, each consisting of a specific 46 MHz base unit frequency paired with a specific 49 MHz handset frequency. The pairing scheme was established in light of overwhelming comments from cordless telephone manufacturers that pairing would reduce the probability of interference between cordless telephones, thereby ensuring more efficient use of the limited available frequencies.[2] Electra opposed frequency pairing because it would mean redesign of its duplex 49 MHz cordless telephones, but presented no argument against the thesis that pairing would reduce mutual interference between cordless telephones. In adopting the new rules, the Commission pointed out that all manufacturers were faced with redesign of their cordless telephones, and that Electra would have the same amount of time to achieve compliance as other manufacturers.

5. In its petition for waiver, Electra contends that more time is needed to exhaust supplies of specialized parts, such as custom-made integrated circuits, which it either has in inventory or long ago ordered under contractual obligation from overseas vendors. Due to long lead times, decisions on whether to order these special parts had to be made before the Commission issued its decision on the new interim rules for cordless telephones, and at the time the outcome of the frequency pairing issue and its bearing on Electra's products were uncertain. The special parts

[1] Operation in the 1.7 MHz region was subject to the conditions of a waiver of Section 15.7 granted to American Telecommunications Corp. For details see the *Order Granting Conditional Waiver*, adopted September 29, 1982, released October 4, 1982, 48 FR 4788.

[2] The fact that frequency pairing will reduce the probability of mutual interference between cordless telephones is explained as follows. With pairing, both frequencies will be either clear of interference or receiving interference. In other words, two nearby cordless telephones would have to be on the exact same frequency pair for interference to occur. Without pairing, the possibilities for interference increase because interference will occur if two nearby cordless telephones match up even on one frequency, a situation that cannot occur with defined frequency pairing.

can only be used in its duplex 49 MHz cordless telephones; so unless Electra is permitted to continue to manufacture such units, the cost of the parts will be a total loss. Electra estimates that it will exhaust the supply of parts if it is permitted to manufacture duplex 49 MHz cordless telephones for 9 months beyond the required manufacturing termination date of October 1, 1984. During this period, Electra estimates that it will produce perhaps as many as 4000 units.

6. GTE Service Corporation filed the only comment on Electra's petition. GTE does not oppose Electra's request, but notes that a recent news article stated that Southwestern Bell Telecommunications Inc. (SWB Telecom) has acquired assets relating to design, manufacture, and marketing of consumer telephone products from Electra Co. GTE asserts that, based on the article, it appears that Southwestern Bell may be the real party of interest in this matter. GTE advises that the Commission should be fully aware of who will be the beneficiary of the requested relief. Electra submitted a reply comment, and, although Electra does not provide details on the arrangement with SWB Telecom, it states that the cordless telephones in question will be of its own manufacture. Electra states that it will remain the grantee of the FCC equipment authorizations issued for this equipment. On December 11, 1984, SWB Telecom submitted a letter intended to clarify its role in this matter. SWB Telecom confirms that it purchased certain assets from Electra, but states that, contrary to the news article, SWB Telecom does not plan to manufacture cordless telephones. According to SWB Telecom, the waiver should rightfully be granted to Electra, the manufacturer of the equipment in question.

7. We accept Electra's argument that it was necessary to order special parts prior to adoption of the new regulations and, under Electra's unique circumstances, it may not have had sufficient time to exhaust parts supplies for its old model cordless telephones. We note that Electra has obtained equipment authorization for and is marketing cordless telephones which conform to the new rules. Thus, Electra is clearly making an effort to come into complete compliance with the new regulations. It is our desire to permit a smooth transition to the new rules and avoid any unnecessary hardship on manufacturers. Given the fact that the 4000 duplex 49 MHz cordless telephones produced by Electra during the additional 9-month period will represent only a small fraction of all units expected to be introduced into the market, the potential negative impact on the probability of mutual interference between cordless telephones is expected to be negligible. Also weighing in our decision is the fact that cordless telephones are not offered interference protection under the Part 15 rules. The point raised by GTE about the relationship between Electra

and SWB Telecom is not considered to be a bar to the grant of the waiver request. Accordingly, we are inclined to grant the requested relief.

8. Pursuant to the above and under the authority of Sections 4(i), 302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that Electra [illegible] is granted a waiver of Section 15.117(b) to allow it to continue to manufacture up to 4000 duplex 49 MHz cordless telephones under the provisions of Section 15.118 until July 1, 1985.

9. For further information concerning this Order contact Mr. Julius P. Knapp, Office of Science and Technology, telephone (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Satellite Communications, Procurement

Commission concluded that regulation of satellite procurements can be replaced by market forces and eliminated its satellite procurement rules.

—*Elimination of Part 25*
CC Docket No. 84-360

FCC 85-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 25 of the Commission's Rules and Regulations with respect to the procurement of apparatus, equipment, and services required for the establishment and operation of the global communications satellite system and satellite terminal stations.	CC Docket No. 84-360

REPORT AND ORDER

Adopted January 11, 1985; Released January 18, 1985

BY THE COMMISSION:

Background

1. On March 30, 1984, we instituted a rulemaking proceeding to ascertain the applicability and need to retain the satellite procurement rules set forth in Part 25 of the Commission's Rules and Regulations 47 C.F.R. 25.101 *et seq.* [1] The Communications Satellite Act of 1962 (the Act) declared among other things, that "maximum competition be maintained in the provision of equipment and services utilized by the system." (Section 102(c).) Pursuant to Section 201(c)(11) of the Act, the Commission adopted in 1964, the present procurement rules to achieve this regulatory objective.

2. In the Notice of Proposed Rulemaking we pointed out that twenty years ago the establishment of a single commercial satellite system raised

[1] Amendment of Satellite Procurement Rules, NPRM Mimeo No. 34361 (released April 10, 1984).

concern as to major carriers which sought to participate in the system and were also engaged in the manufacture of satellite hardware and related facilities through corporate affiliates. As a consequence, the satellite procurement rules were enacted to achieve the policy objective of effective competition in the procurement of equipment and services and to prevent unfair competitive advantages from accruing to any manufacturing interest. However, since the enactment of the rules, changed circumstances have raised a question as to the need for retention of the satellite procurement rules.

3. The objective of establishing a global communications satellite system has been achieved through the Intelsat system. Since its inauguration the system has grown in size and complexity with many countries creating domestic and regional systems. Such growth has resulted in a significant demand for earth station equipment, much of which is presently available "off-the-shelf," and a satellite equipment industry that is highly competitive. The Commission has previously recognized that many buyers and sellers for earth station equipment now exist and will continue to exist in the future.[2]

4. Moreover, the Commission on March 30, 1984, in Docket No. 82-540 proposed the introduction of competition into earth station ownership and operation, providing an incentive for competing earth station owners to seek the least cost, most efficient equipment and services in order to remain competitive which would alleviate Congress' original concern about the potential effect of establishment of a single commercial system on competition in the procurement of equipment and services.[3] The Commission also expressed concern that the rules appeared administratively burdensome and costly and might even discourage entry by some potential carriers, as in the case of small earth station operators seeking to provide Intelsat's new IBS service or specialized television services. We then tentatively concluded that the Commission's mandate to insure effective competition in the procurement of earth station equipment and services could be accomplished through reliance on marketplace forces.

5. Therefore, we proposed elimination of the satellite procurement rules. However, because of our concern for the Communications Satellite Corporation's (Comsat) and the American Telephone and Telegraph Company's (AT&T) positions as significant forces in both the international marketplace and in satellite communications and technology, we not only requested comments as to elimination of the satellite procurement rules, but also comments as to whether the rules should be amended to apply to

[2] Amendment of Satellite Procurement Rules, NPRM, Mimeo No. 33039 (released April 18, 1983); Report and Order adopted, 95 FCC 2d 40 (1983).

[3] U.S. Earth Station (Notice of Inquiry), 90 FCC 2d 1458 (1982); (Notice of Proposed Rulemaking) Mimeo No. 34406 (released April 20, 1984).

either or both of these entities. The Commission also solicited comments as to alternative regulatory approaches to the current comprehensive rules.

Comments and Replies

6. Comments have been submitted by eleven parties, including the American Legal Foundation (ALF), American Satellite Company (ASC), Comsat, Home Box Office, Inc. (HBO), International Relay, Inc. (IRI), MCI International, Inc. (MCI), RCA Global Communications, Inc. (RCA Globcom), Satellite Business Systems (SBS), the U.S. Small Business Administration (SBA), TRT Telecommunications Corporation (TRT) and AT&T. Replies were filed by RCA Global, MCI, IRI, Comsat and AT&T. All of the parties advocate amendment of the procurement rules in some manner except for SBA. Four urge total elimination of the rules; two, while agreeing with the elimination of the rules as to all others, take no position on the applicability of such rules to AT&T and Comsat.

7. The majority of the comments agree with the Commission's basis for its tentative conclusion. For the most part, they perceive no need for the retention of a regulatory scheme to ensure competition in the purchase of satellite earth station equipment and denote that changed circumstances since the advent of the rules have created market forces that are truly competitive. Only SBA contends that the retention of the Commission's procurement rules in their entirety is necessary. RCA Globcom and IRI, however, express serious concern as to the ability of Comsat and AT&T to utilize their present market positions for possible anti-competitive purposes. MCI contends it is an involuntary contributor in the Earth Station Ownership Consortium (ESOC) and that ESOC ownership shares should be reallocated in line with the ESOC members usage ratio. Since it continues to be a contributor and investor in ESOC facilities, it requests that the satellite procurement rules be applied to ESOC stations pending resolution of Docket No. 82-540, where the issue of reallocation of ESOC members shares will be addressed.

Discussion

8. The Communications Satellite Act of 1962 declares, among other things, that "maximum competition be maintained in the provision of equipment and services utilized by the system." (Section 102(c).) In order to implement this policy, Section 201(c)(1) provides, in part, that the Commission shall:

> "insure effective competition, including the use of competitive bidding where appropriate, in the procurement by the corporation and communications common carriers of apparatus, equipment, and services required for the establishment and operation of the communications satellite system and satellite terminal stations; — "Section 201(e)(11) states that the Commission shall" "make rules and regulations to carry out the provisions of this Act."

The Commission enacted such rules in 1964, stressing that its regulatory objective was to establish a framework of procurement procedures which would afford all concerns, including small businesses, an equitable opportunity to share in the procurement requirements of the Communications Satellite System and satellite terminal stations, and to prevent an unfair competitive advantage accruing to any manufacturing interest who might participate in the ownership of the corporation. The Commission also emphasized that it was not its intention in promoting the rules to participate in the selection of contractors nor to engage in contract negotiations.

9. Congress' and the Commission's concern in 1964, was the prevention of possible anticompetitive practices by the single commercial entity it was then creating. The impact of any such anticompetitive conduct upon the procurement of earth station equipment by all interested concerns including small businesses was of particular import. In short, the absence of competition was the overriding concern and the reason the Commission instituted its regulatory framework. However, the Commission repeatedly noted its reluctance to interjecting itself into the contractual process and clearly made known that its basis for creating its procurement rules was to insure effective competition. Now, twenty years later we are reviewing the need for such regulation and with the exception of the SBA, every participating party agrees that such regulation is no longer necessary, that it is administratively burdensome, and that in view of present and future marketplace forces, competition can ably substitute for out-dated and unneeded regulation. We have previously recognized that many buyers and sellers for earth station equipment now exist and will continue to exist in the future.[4] Until recently, the satellite procurement rules applied only to Comsat and RCA Globcom. However, with the inauguration of IBS service, smaller carriers owning and operating IBS earth stations will be included within the scope of the procurement rules. These smaller carriers stress in their comments: (1) the need for smaller carriers to respond quickly and proceed expeditiously with service implementation once Commission authorization is received without unnecessary delay; and (2) the administrative burden and costs associated with the keeping of unneeded records and numerous filings with the Commission. The comments support the Commission's previous finding that a thriving and competitive earth station equipment market exists and will exist in the future. For example, Comsat in its comments notes that in its active procurements for global earth stations alone (that is those procurements in which an award has been made but contract work not yet been completed), over 147 companies submitted bids for 42 procurements and over 460 companies were solicited. Moreover, thirty-two awards were

[4] Footnote 2, supra.

made to small businesses representing $31 million of a total of $61 million in procurements. Further, in 1982 small businesses received 21 of the 38 global system procurement awards; in 1983, 29 of 47 awards; and in 1984, 10 of 15 awards. Awards were not based upon any FCC requirement for awards to small business. Comsat in its attachment I to its comments entitled "Estimated Sales of Earth Station equipment by Major North American Companies (1980) demonstrates the diversity of competition in the earth station equipment market. ALF in its comments, estimates there are currently 2000-8000 outlets nationwide with prices dropping and quality improving. Moreover, as a result of the *Report and Order* adopted December 4, 1984 modifying the ownership and operation of U.S. earth stations, the competitive forces already governing the earth station equipment marketplace will only be enhanced.[5]

10. SBA is the only party seeking retention of the procurement rules in their entirety. SBA initially asserts that the Commission's Initial Regulatory Flexibility Analyses (IRFA) is inadequate in that it failed to provide an opportunity for balanced analysis and decision making and that a more complete analysis should be conducted and published. The IRFA clearly denotes the Commission's tentative conclusion to eliminate or amend its satellite procurement rules and its basis for the conclusion that marketplace forces can be substituted for continued regulation. The Commission had previously recognized that many buyers and sellers for earth station equipment now exist. The IRFA stated the basis of its proposed action, its proposed effect and its consequences. We believe, therefore, that the IRFA accurately depicts its proposed action for concerned individuals and that SBA's allegations of inadequacy are without merit. SBA also contends that the existence of an effective procurement program is necessary for the small business community to make a meaningful contribution to the earth station equipment marketplace. The other participants to this proceeding, however, agree that the dynamics of the earth station equipment market provide the necessary competition to replace the outdated and now unnecessary regulatory scheme. The record before us discloses that small businesses have been actively soliciting and receiving procurement awards on the merits of their proposals and that these awards were not based upon any FCC requirement for awards to small business. It appears, therefore, that small businesses are and will continue to be an active part of the competitive forces governing the earth station equipment marketplace and there is no need remaining for continuance of the existing regulatory framework. Moreover, in the event an instance of anticompetitive conduct occurred an earth station equipment manufacturer is not without regulatory recourse. A complaint could be filed pursuant to Sections 206-208 of

[5] U.S. Earth Stations (Report and Order) Mimeo No. 35335 (released December 18, 1984).

the Communications Act of 1934, as amended, 47 U.S.C. 206-208. Thus, an appropriate vehicle is available for Commission action.

11. One question remains. RCA Globcom and IRI urge retention of the rules for Comsat and AT&T. IRI maintains that Comsat is in a position to favor and crossubsidize its manufacturing affiliates and therefore its procurement contracts must be scrutinized prior to award. Such scrutiny provides a necessary deterrent to anticompetitive behavior and is a vehicle for effective oversight of Comsat's monopoly service activity. IRI also believes that AT&T, having a virtual monopoly over international MTS traffic comprising 85% of Intelsat utilization, also is in a position to dominate the market for international earth station services and equipment; therefore the procurement rules should be applied to AT&T as an additional window through which to gauge and to prevent anticompetitive behavior.

12. In the *Report and Order*, noted above, we concluded that the public interest would be served by an earth station ownership policy which permits individual carrier ownership and operation of such stations and relies on competition to the maximum extent possible. As a result of our action competing earth station owners and operators will have the incentive to seek the least cost, most efficient equipment and services in order to remain competitive, including both Comsat and AT&T. Basically, those that seek retention of the procurement rules for Comsat raise the specter of cross-subsidization of earth station equipment manufactured by its affiliates. In view of the competitive atmosphere we are creating, the incentive for or likelihood of Comsat attempting such a possibility is remote. Were Comsat to favor its own or other equipment where superior alternative equipment is available, given the competitive, open entry market we have established in the earth station services field, it would be placed at a competitive disadvantage. Such a disadvantage would accrue to the benefit of Comsat's earth station service competitors. Moreover, sufficient scrutiny of such anticompetitive conduct is provided for through the Commission's procedures established in Docket No. 80-634.[6] There is, therefore, no necessity for the retention of a regulatory scheme that at best, would only tangentially address the problem, when there is presently in place a regulatory means to directly confront the problem of cross-subsidization.

13. We also reluctant to retain an otherwise outmoded rule on the basis of speculation that AT&T might some day utilize its position in the MTS International Service market to dominate the earth station equipment market. AT&T does not presently itself or through any of its subsidiaries manufacture earth station equipment. If this problem pre-

[6] Communications Satellite Corporation (Second Memorandum Opinion and Order) Mimeo No. 34402 (released April 20, 1984).

sents itself in the future we retain ample regulatory tools to deal with it. Specifically, AT&T must obtain Titles II and III authorization to construct and operate earth stations. AT&T's applications will be scrutinized to prevent any anti-competitive conduct. Moreover, any license granted to AT&T may be subject to regulatory conditions.

14. Every party to this proceeding, with the exception of SBA, agrees that the business of manufacturing earth station equipment is flourishing, includes many small businesses, and is highly competitive. We have previously determined on the record before us that there is no longer a need for the satellite procurement rules and that present and future market forces in the earth station equipment market may substitute for the present regulatory scheme. For the reasons stated above, we see no reason to retain the procurement rules solely for Comsat and AT&T. As to MCI's comments regarding the reallocation of ESOC members shares, this issue was resolved in the *Report and Order* concerning the ownership and operation of U.S. earth stations, and no further consideration is necessary in this proceeding.

Regulatory Flexibility Act Final Analyses

15. The rule change effected herein eliminating the satellite procurement rules is appropriate in view of the record developed in this proceeding. As noted in the 1964 *Communications Satellite Procurement* order the Commission's regulatory objective was not to "participate in the selection of contractors "but rather" to establish a framework of procurement procedures which will afford all concerns, including small business, an equitable opportunity to share in the procurement requirements of the communication satellite system and satellite terminal stations, and to prevent an unfair competitive advantage occuring to any manufacturing interest who may participate in the ownership of the corporation. 1RR 2d at 1612-13. In 1983, the Commission recognized that many buyers and sellers for earth station equipment now exist and will continue to exist in the future. The comments in this proceeding affirm this conclusion. In 1984, the earth station equipment market has many outlets, including small businesses and is flourishing. Our *Report and Order,* noted above, modifying the ownership and operation of U.S. earth stations will also provide incentives for earth station owners and operators to seek the least cost earth station equipment and further enhance the competitive environment. It is clear then that the regulatory objective of the procurement rules can now be met through marketplace forces and that a framework of regulation is unnecessary to insure competition and an equitable opportunity to share in the procurement of earth station equipment. Another advantage is that earth station owner's and operators, both large and small, will not be confronted with the administrative burden and costs of regulation.

16. Only one comment was received that directly addressed the initial regulatory flexibility analysis. SBA asserts that our initial flexibility analysis is inadequate in that it fails to assess the impact of what it labels the small business procurement requirement. SBA is in error. The Commission has previously recognized that many buyers and sellers for earth station equipment now exist and will exist in the future. On that basis the Commission made its tentative conclusion that marketplace forces could replace its regulatory framework. SBA errs in construing the intent of the rule. The intent was to insure competition and to provide an equitable opportunity for all concerns to participate in earth station equipment procurement including small businesses. Our previous finding as to competition and marketplace forces have been affirmed by all the commentators and the record aside from SBA. The changes herein adopted merely recognize that the satellite procurement regulations are no longer necessary to achieve the purposes of the Act. In short, the original regulatory objectives can be met through marketplace forces and other regulatory tools, such as the Commission's complaint process, as demonstrated in this record. To adopt SBA's interpretation of the rules is to ignore its true intent and meaning and assign the Commission a role it has studiously avoided all these years. The record in this proceeding discloses no adverse impact upon small earth station equipment businesses by elimination of the rules but does indicate that the action taken will remove the administrative burden and costs of regulation from small earth station owners and operators.

17. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 4(j), 201-205, 214, 215, 218, 220, 303, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 154(j) 201-205, 214, 218 220, 303, 309, 403 (1976), Sections 102(c), 201(c), and 401 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701(c), 721(c) 741 (1976), and Section 553(b) of the Administrative Procedure Act, 5 U.S.C. Section 553(b) (1970), Sections 25.151 through 25.178 of the Commission's Rules are hereby eliminated and deleted.

18. IT IS FURTHER ORDERED, the proceeding in Common Carrier Docket No. 84-360 IS TERMINATED.

19. IT IS FURTHER ORDERED, that, the deletion of Sections 25.151 through 25.178 will become effective upon publication of this Report and Order in the Federal Register.

20. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this Report and Order to be published in the Federal Register and

shall mail a copy of this Report and Order to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

One-To-A-Market Policy

In seeking an exception to one-to-a-market policy to permit common ownership of a radio/UHF television combination in the same market, where the UHF station is profitable and no other significant Commission policy is involved, applicant's proposed programming is not sufficient to overcome public interest concerns underlying multiple ownership rules. However, application is granted subject to divestiture condition.

—*Gulf B/cing Co.*

FCC 84-626

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Gulf Broadcasting Company c/o Akin, Gump, Strauss, Hauer & Feld 1333 New Hampshire Avenue, N.W. Suite 400 Washington, D.C. 20036	Station KTXA-TV Arlington, Texas File No. BALCT-840716KE Station KTXH-TV Houston, Texas File No. BALCT-840716KG

Adopted: December 11, 1984; Released: December 13, 1984

Gentlemen:

This is with reference to the above-captioned applications for the assignment of license of Station KTXA-TV, Channel 21, Arlington, Texas, from Channel 21, Inc. to DAL-GBC Corporation and the assignment of license of Station KTXH-TV, Channel 20, Houston, Texas, from Channel 20 Enterprises to HOU-GBC Corporation.

Both assignees are wholly-owned subsidiaries of Gulf Broadcasting Company (Gulf). In addition, KTXQ, Inc., the licensee of KTXQ-FM, Ft. Worth, and Gulf Broadcasting Group, Inc., the licensee of KLTR-FM, Houston, are also subsidiaries of Gulf. Therefore, these applications to acquire television stations in Arlington[1] and Houston are subject to the

[1] Arlington is located within Dallas County, which is part of the combined Dallas-Ft. Worth market as viewed by both Nielsen and Arbitron ratings services. Channel 21 is assigned to Ft. Worth but is being used in Arlington under the former "fifteen-mile rule." For discussion purposes, this market will generally be referred to as Dallas.

Commission's one-to-a-market rule, 47 U.S.C. §73.3555(b), which generally prohibits common ownership of radio and television stations in the same market. However, Note 4 to that rule provides that applications for UHF television stations will be considered by the Commission on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Gulf argues that while the one-to-a-market rule is designed to preserve the diversity of competition among media voices in a market, Note 4 to Section 73.3555 of the Rules serves as a means of promoting the development of UHF television service generally. Thus, Gulf maintains that grant of its applications will promote the public interest by strengthening the competitive position of the UHF stations in each market, which it states have only recently become "marginally profitable," while not adversely affecting competition or the diversity of media voices which are the policies underlying the one-to-a-market rule.

Specifically, Gulf contends that joint operation of an FM radio/UHF television combination in both Dallas and Houston will not adversely affect diversity and competition in either market. It states that there are currently nine television stations licensed to and operating in the Dallas-Ft. Worth market-five VHF (three of which are affiliated with national networks) and four independent UHF stations (including KTXA-TV) with applications pending for an additional commercial television station in Dallas and an additional noncommercial station in Ft. Worth. It further observes that there are six television stations (all network-affiliated commercial VHF stations) licensed to nearby communities which provide service within the Grade B signal contour of KTXA-TV, with construction permits outstanding for three additional commercial television stations within that area. With respect to Houston, Gulf asserts that there are currently seven television stations licensed to and operating in that city - four VHF (three of which are affiliated with national networks) and three independent UHF stations (including KTXH-TV) - with applications pending for an additional commercial television station and a construction permit outstanding for a new noncommercial station. It further states that there are four VHF and one UHF television stations (all affiliated with a national network) licensed to communities which provide service within the Grade B signal contour of KTXH-TV, with applications currently pending for two new UHF stations and a construction permit outstanding for another UHF station within that area. Gulf indicates that the most recent ratings reports indicate that the network-affiliated VHF stations dominate each market, in Dallas with a combined 24 rating and 71 audience share and in Houston with a combined 19 rating and 67 audience share for the 7 a.m. to 1 a.m. time period. In contrast, Gulf alleges that KTXA-TV received a rating of 2 and an audience share of 6 in Dallas and

KTXH-TV received a rating of 2 and an audience share of 8 in Houston. Gulf asserts that because many advertisers view ratings as significant, KTXA-TV and KTXH-TV are at a disadvantage to compete for advertising revenue with the dominant VHF stations in each market.

Gulf further alleges that there is an abundance of radio stations in each market. It states that there are fourteen AM and twenty-one FM stations currently licensed to Dallas-Ft. Worth, with audience levels uniformly distributed. According to ratings information submitted by Gulf, no Dallas-Ft. Worth radio station has greater than a 9.4 percent audience share, with a 3.8 percent share garnered for KTXQ-FM. In Houston, Gulf states there are eleven AM and sixteen FM stations, with audience levels also evenly distributed and no one station having greater than a 8.7 percent audience share and KLTR-FM having a 4.8 percent share. Moreover, Gulf notes that in addition to the television and radio stations in Dallas and Houston, each market is served by numerous daily newspapers and that cable television, low power television and multipoint distribution service currently, or soon will, provide additional sources of video and audio services. For these reasons, Gulf maintains that the extremely competitive conditions and the multiple outlets for expression that exist in these markets ensure that combined ownership of a UHF and FM facility by Gulf in each city is compatible with the objectives of the Commission's multiple ownership rules. Gulf asserts that this is particularly true in Dallas, where each licensee of a network-affiliated VHF station has other media interests in the market, including one which is not only the licensee of an AM, FM and television combination, but also publishes a local daily newspaper there. Therefore, Gulf maintains that its contention that the Dallas market can flourish with joint ownership of broadcast facilities is demonstrated by the fact that it now does so.

Gulf contends that the joint ownership of the proposed FM/TV combinations in each market will benefit the public because it will signficantly improve the operations of all the stations. It maintains that the Commission has recognized that joint operations, such as those proposed, may create operating efficiencies that lower a multiple owner's production costs, thus permitting it to channel saved resources into other areas such as the acquisition of better programming previously unavailable in a given market. In that regard, Gulf states that the ability to draw on the revenues of both the FM and television stations in each market would permit it to devote substantial resources to providing in-depth local public affairs programming to meet the needs and interests of those segments of the community presently unserved or underserved by broadcasters in these cities. Each application sets forth a public affairs television programming proposal including a locally produced weekly half-hour show devoted to the general needs and interests of their communi-

ties, as well as weekly telecasts generally addressing the needs of Hispanics, Blacks and the elderly and syndicated self-help, health, agricultural and children's programming. Gulf proposes to continue to offer a syndicated news program at least six nights a week and will consider adding a locally produced news program in each market. Moreover, Gulf states that the locally produced public affairs television programming in each market will be broadcast, at times to be determined, by the FM station there, increasing the exposure of that programming to additional audiences than would be the case if carried on the television station alone. In addition, the stations will jointly produce regularly scheduled programming, such as a music show geared primarily to the FM stations' younger audiences, to be broadcast by both stations in each market. Gulf further states that the stations will also consider joint produciton of an employers job hot line, geared especially to the employment needs of young people, to be promoted by both stations in each market. It contends that common ownership in each market would provide additional opportunities for event-oriented public service projects, such as blood drives and campaigns aimed to the dangers of driving under the influence of drugs and alcohol, the effectiveness of which will be enhanced by the joint resources of the FM/TV combinations.

Finally, Gulf argues that common ownership of these stations would provide for expanded public service programming in markets where there are multiple outlets for expression with dominant voices such as the VHF network affiliates. It maintains that the strengthening of both the FM and television stations in terms of resources, programming capabilities and expertise will enhance the competitiveness of those stations and thus increase diversity in each market. Although Gulf claims that the revenue from the FM stations is not necessary to the survival of the television stations in each market, it contends that such a cross-subsidization is not a prerequisite to a finding that common ownership serves the public interest. However, it does assert that only by the joint operations and revenues of both the FM and television stations in each market will Gulf be able to present the quality and quantity of programming that it proposes. In this regard, Gulf has submitted material showing its record of public service in the operation of its other broadcast properties. It states that such data provides strong assurance of its ability and commitment to implementing its programming plans in Dallas and Houston. Such programming, it claims, will enable it to expand its audience and thereby attract advertising revenues that will enhance the competitiveness and long-term viability of the independent UHF stations. Moreover, Gulf contends that to compete effectively for viewership with the dominant VHF stations in Dallas and Houston, it is necessary that KTXA-TV and KTXH-TV have access to the audience served by the radio

stations. Therefore, Gulf concludes that grant of its applications will serve to enhance and promote the Commission's goals of program diversity and economic competition in the broadcast media.

In considering Gulf's requests, we first note that the principles embodied in the one-to-a-market rule, as well as all of the multiple ownership rules, are to promote diversity of ownership in order to maximize diversification of viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. *See Multiple Ownership Rules,* 22 FCC 2d 306, 311 (1970), *recon. granted in part,* 28 FCC 2d 662 (1971). The Commission has emphasized that application of the multiple ownership rules furthers the goal of diversification of program service without any governmental encroachment on what it recognizes to be prime responsibility of the broadcast licensee, *i.e.,* the selection of program material. *The Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* 18 FCC 288, 292 (1953). However, in order to implement the policy of fostering the development of UHF television generally, the Note 4 exception to the multiple ownership rules affords the Commission greater flexibility in dealing with UHF applications than it has in dealing with other applications which are subject to the proscription of Section 73.3555. 28 FCC 2d at 674. Thus, common ownership of a radio and UHF television station in a market can be permitted only when it will ensure the development of a new television service or sustain the operation of an unprofitable or otherwise nonviable UHF facility.

Generally, grants of applications creating UHF/radio combinations in the same market have principally involved situations where profits from the radio station were essential to the viability of an unprofitable UHF facility. *See, e.g., Wilton E. Hall,* 68 FCC 2d 642 (1978); *Pacific Broadcasting Corp.,* 66 FCC 2d 256 (1977), *recon. denied,* 68 FCC 2d 845 (1978). However, other factors that promote significant Commission policies have also been considered in acting upon such applications. These factors have included: the provision of a first local full-service UHF television station in an area where no other applicant appeared likely to do so, *TV-8, Inc.,* 91 FCC 2d 1012 (Rev. Bd. 1982), *review denied,* FCC 83-238, released August 29, 1983; the integration of local broadcast experience which would promote the inauguration of the first broadcast outlet in the community, *66 Corporation,* 47 RR 2d 1444 (1980); the furtherance of the Commission's policy of increasing minority ownership in broadcasting, *Tierra del Sol Broadcasting Corp.,* 49 RR 2d 332 (1981); and the substantial improvement of the only network-affiliated television station operating in New Jersey, *New Jersey Cape Broadcasting Corp.,* 85 FCC 2d 654 (1981), *recon. denied,* 89 FCC 2d 984 (1982). Turning to the matters

before us, we are unable to conclude that Gulf has demonstrated that the establishment of these proposed UHF/radio combinations outweigh the disadvantages inherent in the operation of two stations in the same market by one party. Gulf does not claim that either station is unprofitable or incurring financial losses,[2] as was the case when the Commission recently approved an AM/UHF combination in Dallas. *See Metromedia, Inc.*, 54 RR 2d 1469 (1983). In fact, Gulf explicitly states that KTXA-TV and KTXH-TV are profitable and that the combination of revenue, expertise and resources from the FM stations in each market is not necessary to ensure the survival of the television stations there. Instead, it is Gulf's belief that common ownership will provide economies of scale and resources to permit it to make available public affairs programming not carried by other stations in those cities. By offering such programming, it hopes to attract more viewers in order to garner additional ratings and advertising revenue, which it maintains serves the public interest by increasing the "competitiveness" of the UHF stations. However, as previously stated, this type of programming decision is, within the broadest limits, solely a matter of licensee discretion. Program content is not an area into which the Commission wishes to intrude. Although we have on occasion considered programming proposals in some cases, it has never been the primary basis on which a Note 4 exception was made. *See, e.g., Metromedia, Inc., supra,* (substantial losses had been incurred at the television station); *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016 (Rev. Bd. 1980), *review denied,* FCC 80-736, released December 4, 1980 (segments of the population had unserved needs). Here, however, the television stations are profitable and no other significant Commission policy of the nature of those proposed in other cases is involved. Therefore, we find that proposed programming by itself does not overcome our concern as to concentration of control of the media in the cities involved here.

Although we do not dispute that the benefits inherent in common ownership would provide the stations in question with certain economies of scale and resources, putting the UHF services in a more competitive position with the VHF television stations in Dallas and Houston, in light of the other factors in this case, that alone does not persuade us that grant of these applications will foster the general development of UHF television service as contemplated by that policy. As a result, and under the circumstances presented here, we perceive no basis for undermining the policies embedded in our local multiple ownership rules. Similarly, we do not agree with Gulf that multiplicity of broadcast outlets or the degree of existing cross-ownership in Dallas and Houston justifies a departure

[2] This conclusion is not changed by the recently submitted information, which projected that operating losses would be incurred by Gulf during the first year of operation.

from the one-to-a-market policy in this instance. The Commission has stated that the factor of media abundance alone shall not be determinative, *John R. Kingsbery,* 71 FCC 2d 1173 (1979); *Palmetto Radio Corp.,* 67 FCC 2d 771 (1978), and that the fact of existing media concentration in a community does not justify a further increase in such concentration. *Puerto Rico Broadcasting, Inc.,* 46 RR 2d 107 (1979).

Moreover, the Commission has recently taken steps to liberalize the rules that limit multiple ownership of broadcast facilities on a national and regional level. For example, it has: revised the standards for reporting attributable interests in broadcast, cable television and newspaper properties, *Corporate Ownership Reporting and Disclosure by Broadcast Licensees,* 55 RR 2d 1465 (1984); abolished the regional concentration of control rule, *Multiple Ownership (Regional Concentration of Control Provisions),* 55 RR 2d 1389 (1984); and sought to expand multiple ownership in each broadcast service to twelve, *Multiple Ownership (Seven Station Rule),* 56 RR 2d 859 (1984). In its orders announcing such changes, the Commission has consistently stressed the continued importance of the local ownership limitations, such as the one-to-a-market rule, to ensure programming and ownership diversity and lack of concentration of the control of broadcast facilities in the relevant local markets.

In sum, we conclude that Gulf has not presented a sufficiently persuasive showing to outweigh the Commission's long-standing policy of diversifying ownership and control of broadcast media. Accordingly, we shall grant the applications to assign the licenses of KTXA-TV, Arlington, Texas, and KTXH-TV, Houston, Texas, only on the condition that Gulf divest itself of the two colocated FM stations no later than 18 months from the date of this letter.

BY DIRECTION OF THE COMMISSION*
WILLIAM J. TRICARICO, *Secretary*

* (Commissioners Quello and Dawson concurring in the result; Commissioner Rivera dissenting to that part of the decision approving combined ownership for 18 months.)

Reconsideration

Petition for reconsideration of *Hampshire County Broadcasting Co., Inc.*, FCC 84R-92, released December 14, 1984, denied. —*Hampshire County B/cing Co., Inc.* BC Docket No. 81-159

FCC 85R-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Hampshire County Broadcasting Co., Inc. Amherst, Massachusetts	BC Docket No. 81-159 File No. BPH-9176
Amherst Broadcasting, Inc. Amherst, Massachusetts	BC Docket No. 81-160 File No. BPH-9566
For a Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted March 8, 1985; Released: March 12, 1985

BY THE REVIEW BOARD:

1. Our Decision, 57 RR 2d 463, released December 14, 1984, affirmed the Chief Administrative Law Judge's Initial Decision which found that both applicants were basically qualified and that Hampshire County was the superior comparative applicant because it would bring a competing voice to the community of Amherst. The unsuccessful applicant, Amherst Broadcasting. Inc., which already operates a daytime only AM station in the community, seeks reconsideration, urging two points which it claims alter the comparative analysis. This latest pleading in the eleventh year of litigation between these parties is mercifully brief, but again completely lacking in merit.

2. First, Amherst argues that the finding that Robert A. Morley will be Hampshire's full-time general manager, Decision, para. 14, is contradicted by the statement made by a second Hampshire principal in another ongoing FCC hearing and that Amherst therefore is entitled to a stronger credit on the integration factor. Hampshire responds that the statement in the other proceeding "was inadvertent and incorrect" and has been corrected. Thus, petitioner's premise is factually wrong; but even if we were to increase Amherst's integration preference from "moderate" to "substantial," the Board has previously concluded that under controlling Commission precedent Amherst would not overcome the substantial diversification preference awarded to Hampshire which will bring a new voice to the community. Board Decision, para. 15.

3. Amherst's second point is that our diversification analysis was flawed because we did not address the "First Report and Order, FCC 84-640, released December 19, 1984 in Docket 84-231, [which] strongly suggests that the Commission is considering according a preference to local daytime AM licensees over newcomers in FM cases." Pet. p. 3. Our Decision, however, was released December 14, some five days before the cited *Report.* In any event, Amherst has failed to show, or even claim, that the cited *Report* changes the many precedents cited in the Board Decision, paras. 12 and 13, including the Commission's action in *Communications Properties, Inc.,* FCC 83-320, note 1, released July 7, 1983. *See also Big Bend Broadcasters,* FCC 84-645, note 3, released December 26, 1984, a week after the *Report* cited by Amherst.

4. ACCORDINGLY, IT IS ORDERED, That Amherst Broadcasting, Inc.'s petition for reconsideration, filed January 14, 1985, IS DENIED; that its petition for enlargement of issues, which was filed December 20, 1984, and subsequently withdrawn, IS DISMISSED; and that the petition for leave to amend application, filed February 22, 1985, by Hampshire County Broadcasting Company IS GRANTED, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Appeal, Required Permission to Stay Irreparable Injury

Review Board denied request to stay ALJ's ruling requiring applicant to make available one of its principals for cross-examination. Although captioned a stay, request was really an unauthorized appeal. —*High Springs Television, Inc.*
MM Docket No. 84-372

FCC 85R-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
High Springs Television, Inc. High Springs, Florida	MM Docket No. 84-372 File No. BPCT-830427KF
Christian Channel/Ro-Mar Communications, Inc. High Springs, Florida	MM Docket No. 84-373 File No. BPCT-830705KL
For Construction Permit For New TV Station, Channel 53, High Springs, Florida	

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 1985; Released: February 5, 1985

BY THE REVIEW BOARD:

1. The Review Board has under consideration a pleading filed January 22, 1985, by Christian Channel/Ro-Mar Communications, Inc. (CCR), captioned "Emergency Request for Stay," in which CCR objects to a ruling by the presiding Administrative Law Judge (ALJ) on January 22 ordering it to proffer direct evidence and to make available for cross-examination its principal, William W. Mays, Sr., pursuant to certain qualifying issues specified against it. CCR contends (1) that High Springs Television, Inc. (HST), which was allocated the burden of proceeding on

the qualifying issues, tendered no evidence regarding these issues on the exhibit exchange date and (2) that compliance with the ALJ's ruling would cause CCR irreparable harm by compelling it to forfeit its right to have the allegations initially established by the party with the burden of proceeding. CCR requests, therefore, that the Board stay the effectiveness of the ALJ's ruling. However, an opposition was filed on January 23, 1985 by HST, which opposition states that it intends to meet its burden by taking the testimony of Mr. Mays and, then, presenting documents provided to HST by CCR after the exchange date.

2. We will dismiss CCR's pleading.[1] Although captioned a request for stay, CCR's pleading is, for all practical effects, an appeal from an interlocutory ruling of the presiding ALJ urging reversal of the ALJ's ruling. Section 1.243 of the Commission's Rules, 47 CFR § 1.243, confers upon the presiding ALJ the authority to regulate the course of the hearing and to rule upon questions of evidence. Except for certain rulings appealable as a matter of right (not relevant here, *see* Section 1.301(a)), appeals from such interlocutory rulings may be filed only if allowed by the presiding officer. *See* 47 CFR § 1.301(b).[2] Where, as here, consent was neither sought nor obtained from the ALJ, the ALJ's ruling is final unless appellant demonstrates "such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo;* or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corp.*, 32 FCC 2d 533, 534 (1971). We are not persuaded that CCR's appeal raises either of the concerns mentioned in *Communications Satellite Corp., supra. See, e.g., Hanover Radio, Inc.*, 91 FCC 2d 849 (Rev. Bd. 1982) (reversing ALJ's refusal to suspend procedural dates).

3. Moreover, even if CCR's request is analyzed in light of those criteria used to resolve stay requests (*i.e.*, (1) likelihood of prevailing on merits; (2) irreparable injury; (3) insubstantial harm to other parties; and (4) the public interest) enunciated in *Virginia Petroleum Jobber's Ass'n.* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), CCR is entitled to no relief. Its claim of irreparable injury appears overstated, particularly in view of the fact that the ALJ has the initial responsibility for ensuring the compilation of a full evidentiary record.

[1] Because CCR's motion was received by the Review Board on the afternoon of January 22, 1985, and the examination of Mr. Mays was scheduled to convene at 10:00 a.m. on January 23, 1985, the parties were notified orally on the day of hearing that the examination of Mr. Mays would not be stayed.

[2] Although CCR claims that it filed its request pursuant to Section 1.301(c)(1) of the Commission's Rules, that provision merely allows that "[t]he Commission may stay the effect of any ruling which comes before it for consideration on appeal."

See generally Washington's Christian TV Outreach, Inc., 94 FCC 2d 1360 (Rev. Bd. 1983) (proceeding remanded for further limited evidentiary exploration regarding matters considered potentially decisional). Moreover, HST represents that it intends to meet its burden from the testimony of Mr. Mays as well as from documents submitted to HST from CCR. Any objections to the ALJ's ultimate rulings may be raised later in exceptions to the ALJ's Initial Decision, *see* 47 CFR § 1.301(b)(1). Finally, issuance of a stay would not be in the interests of the public or the other applicant because of the unnecessary disruption and hearing delay that it would entail. *See, e.g., Jan-Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983); *contrast Valley Broadcasters, Inc.*, FCC 85R-9, released January 31, 1985.

4. ACCORDINGLY, IT IS ORDERED, That the Emergency Request For Stay, filed January 22, 1985, by Christian Channel/Ro-Mar Communications, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Common Carrier International
Comsat Earth Station Complex
Comsat TV Service Via Satellite
Satellite Earth Station, Joint Ownership of

Liberalized earth station ownership policy permits the construction and operation of U.S. international earth stations which operate with the INTELSAT system outside of the Earth Station Ownership Committee (ESOC) by any common carrier.
—*INTELSAT*
CC Docket No. 82-540

FCC 84-605

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	
Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System	CC Docket No. 82-540

REPORT AND ORDER

Adopted: December 4, 1984; Released: December 18, 1984

BY THE COMMISSION:

1. On August 17, 1982, we initiated through the release of a Notice of Inquiry (NOI) the above-captioned proceeding to solicit comments on whether our current policy, established in 1966, on the ownership and operation of U.S. earth stations which operate with the International Telecommunications Satellite Organization (INTELSAT) global communications satellite system still best serves the public interest.[1] On April 20, 1984, we issued a Notice of Proposed Rulemaking (NPRM) addressing the concerns of both the Commission and interested parties on the status of our current earth station ownership policy.[2] In response to the NPRM,

[1] Notice of Inquiry, Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 90 FCC 2d 1458 (1982).

[2] 97 FCC 2d 444(1984).

comments were filed by the American Telephone and Telegraph Company (AT&T), TRT Telecommunications Corporation (TRT), American Satellite Company (ASC), Home Box Office, Inc. (HBO), RCA Global Communications, Inc. (RCA), MCI International (MCII), ITT World Communications Inc. (ITT), Federal Express Corporation (Federal Express), U.S. Satellite Corporation, Inc. (USSC), the Hawaiian Telephone Company (Hawaiian), the National Telecommunications and Information Administration (NTIA), Equatorial Communication Services (Equatorial), the Communications Satellite Corporation (Comsat), International Relay, Inc. (IRI), Satellite Gateway Communications, Inc. (SGC), Gannett Satellite Information Network, Inc. (Gannett), Public Broadcasting Service (PBS), and the American Broadcasting Companies, Inc. (ABC), CBS Inc. (CBS), and the National Broadcasting Company, Inc. (NBC), (the "Networks"), filing jointly. Reply comments were submitted by AT&T, Comsat, IRI, ITT, RCA, Hawaiian, TRT, the Networks, and Walter Hinchman Associates, Inc. (Hinchman).

2. Below we shall summarize: (a) the existing earth station ownership policy; (b) the Notice of Inquiry and the filings elicited therefrom, including Comsat's wholesale/retail proposal; (c) subsequent developments; (d) the Notice of Proposed Rulemaking; and (e) the comments and reply comments to the Notice of Proposed Rulemaking. We then analyze the filings and conclude that a more open and flexible earth station ownership policy will best serve the public interest by increasing efficiencies and reducing costs to users.

I. Background

A. Existing Commission Policy

3. Our current earth station policy was enunciated in 1966[3] and was implemented in 1967 by Comsat and the U.S. international service carriers through a carrier-created Agreement establishing the Earth Station Ownership Committee (ESOC).[4] Under our existing policy, international earth stations in the United States are owned by a consortium of carriers, including Comsat as well as certain U.S. international service carriers. These international service carriers are AT&T, RCA, ITT, WUI and Hawaiian. Comsat, through its World Systems Division (WSD), has a fifty-percent ownership share and the international service carriers share

[3] Amendment of Part 25 of the Commission's Rules and Regulations With Respect to Ownership and Operation of Initial Earth Stations in the United States for Use in Connection with the Proposed Global Commercial Communication Satellite System *("Second Report and Order")*, 5 FCC 2d 812 (1966).

[4] The joint licensees entered into the Agreement consistent with the Commission's *Second Report and Order*. The carriers have operated the international earth stations since the 1960's pursuant to the Commission's policy decisons, construction/transfer orders, and the ESOC Agreement.

the remaining fifty-percent interest in approximate proportion to their usage of the facilities.[5] Comsat serves as manager of these earth stations, subject to the overall control and guidance on basic policy and investment matters by a committee composed of all co-owners.[6] Voting shares within this committee are in accordance with ownership percentages.

4. In accordance with the ESOC Agreement, as amended,[7] the carriers set up separate earth station ownership consortiums for the contiguous United States, Hawaii, and Guam. The Agreement also prescribes, in accordance with the 1966 policy decision, the ownership share percentages for Comsat, AT&T, Hawaiian, ITT, RCA, and WUI in each consortium.[8] Pursuant to the Agreement, ESOC earth stations are made available to Comsat for the purpose of furnishing earth station and space segment communications services under applicable tariffs to authorized carriers and users. Comsat, in turn, compensates the carriers for their investment by paying the ESOC owners a monthly rental rate for each half-circuit established through the stations.

B. Notice of Inquiry

5. For the purpose of eliciting discussion on possible changes in our earth station ownership policy and the carriers' ownership arrangements, the NOI distinguished between two classes of earth stations: general purpose and special purpose.[9] The NOI also distinguished between

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[5] While the earth stations are jointly owned, Comsat is the sole U.S. investor/provider of INTELSAT space segment and is also the sole U.S. representative to INTELSAT.

[6] RCA serves as manager of the ESOC earth station in Guam, the smallest consortium.

[7] The Agreement was amended to add Guam as a separate consortium. *See RCA Global Communications, Inc.*, 18 FCC 2d 1037 (1969). Puerto Rico/Virgin Islands is also a consortium but it has no international earth stations at this time.

[8] Because the ESOC members were unable to agree among themselves upon an allocation of ownership shares, we set the initial ownership percentages in proportion to the carriers' projected use of the stations. Since the initial allocation of shares, we have approved requests by ESOC members for modifications in ownership shares, including: (a) purchase by AT&T of ITT's interest in the four contiguous U.S. stations, American Telephone and Telegraph Company and ITT World Communications Inc., File No. I-P-C-81-010 (released June 10, 1981), and; (b) purchase by RCA of ITT's interest in the Guam earth station, RCA and ITT, File No. I-S-P-82-004 (released February 10, 1983). We have also authorized 100 percent ownership of earth stations to Comsat where it is directly serving end users (TV service via the Santa Paula, California earth station) and where the local carrier does not desire joint ownership (American Samoa, Palau, Saipan, Marshall Islands, and Micronesia).

[9] General purpose earth stations are those Standard A (30-32 meters in diameter), Standard B (10-13 meters in diameter), and Standard C (18-19 meters in diameter) facilities with which all U.S. international carriers interconnect their operating centers in order to offer international switched and private line services to the public. These earth stations are owned by ESOC. Special purpose earth stations are Standard B or non-standard earth stations designed to meet private line needs of a dedicated user or group of users. Such

existing stations and new stations.[10] With regard to general purpose earth stations, we solicited comments on the merits of individual carrier ownership versus continued consortium ownership of existing and new earth stations. We also requested parties to propose regulatory criteria that we should apply in deciding whether to authorize new general purpose earth stations. As to special purpose earth stations, we requested comment only on whether new special purpose earth stations should be owned and operated in a competitive fashion or in an ESOC-like manner. Existing special purpose earth stations are independently owned outside of ESOC and we did not envision moving these facilities into an ESOC-like consortium. We further sought comment on regulatory criteria for considering individual applications for special purpose earth stations.

6. We also asked for comments on the relationship of Comsat's corporate structure to the issues in the proceeding. Several of the issues we identified were: (a) whether Comsat's current ownership share of general purpose earth stations should be in the parent company's World Systems Division (WSD), as it is now, or transferred from WSD to a Comsat subsidiary; (b) whether Comsat's ownership of new earth stations should be in the WSD or in a separate subsidiary; and (c) whether Comsat's existing tariff, which bundles the earth station and space segment elements into one rate, should be unbundled if entities other than Comsat or ESOC were to be authorized to construct and operate international earth stations. Finally, we requested comment on the proper role of Comsat, as the U.S. Signatory to INTELSAT, in any ownership arrangement with particular emphasis on: (a) the method of coordinating U.S. earth station investment and operation with INTELSAT space segment; and (b) the extent of carrier and public participation in Comsat/INTELSAT forums.

7. The comments received in response to the NOI indicated that all parties,[11] with the exception of Comsat, favored an open entry policy and proposed with respect to new general and special purpose earth stations that any carrier be allowed to apply to the Commission for authorization subject only to the "public interest, convenience, and necessity" test of Section 201(c) of the Communications Satellite Act of 1962.[12] These parties

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stations are envisioned to be located near a customer's premises in order to reduce landline interconnection costs, improve quality of service, or both.

[10] Existing stations were considered to be stations that have been authorized, whether or not they were actually operating or under construction.

[11] Respondents were Comsat, AT&T, ITT and All America Cables filing jointly, RCA, Western Union Telegraph Company, TRT Telecommunications Corporation, American Satellite Company, Home Box Office, National Public Radio, American Petroleum Institute, and ABC, NBC, and CBS filing jointly, the Departments of Defense and Justice, and M/A-COM.

[12] 47 U.S.C. 721(c).

claimed that a more competitive earth station ownership policy, coupled with an unbundling of Comsat's tariff, would lead to lower end-to-end rates without compromising service quality or injuring Comsat. Comsat favored the preservation of the current ownership arrangement and argued that independent ownership would promote a proliferation of earth stations that could jeopardize the low cost and high quality service provided by the existing arrangement, thus harming U.S. and INTELSAT interests.

8. Subsequent to the filing of comments and reply comments, Comsat, in recognition that its views were not supported by the other parties, proposed a new approach that it believed would preserve the benefits of the current arrangements (e.g., efficient use of the INTELSAT system and the ability of actual and potential U.S. carriers which are competitors in the provision of end-to-end international communications services to obtain fair and equitable access to the INTELSAT system) while being more acceptable to other interested parties.[13] Comsat's proposal contemplated that the ESOC members would negotiate among themselves the dissolution of the current ownership arrangement and convert the existing ESOC stations into "wholesale/retail" combination stations at which Comsat's international "wholesale" facilities and operations, as well as the carriers' end-to-end "retail" facilities and operations, would be collocated. Comsat would acquire the land, buildings, antennas and most of the common electronic equipment. Comsat would then provide earth station services and the INTELSAT space segment to the end-to-end service carriers who in turn would provide a through service to their customers. Following a three-year moratorium, the "retail" service carriers would have the option of continuing to participate in joint earth station ownership arrangements and/or seek authority to construct and operate their own general purpose and most types of special purpose earth stations.[14]

9. Comments received with regard to Comsat's "wholesale/retail" facilities proposal were divided among those parties who favored the proposal as a starting point for negotiations, those totally opposed to it, and those, including AT&T, who proposed alternative approaches. All

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[13] Comsat moved for leave to file a pleading titled "Proposal for Restructuring Earth Station Ownership and Operating Arrangements." Motion of Communications Satellite Corporation for Leave to File a Proposal for Restructuring Earth Station Ownership and Operations Arrangements, June 23, 1983. The Commission granted the motion and reopened the docket for additional comments and replies by interested parties. Earth Station Ownership, Mimeo No. 5713 (released August 2, 1983).

[14] Under this proposal, ESOC joint owners would negotiate the dissolution of the consortium and a division of the earth stations' assets. Also, applications for INTELSAT Business Service (IBS) and certain small earth stations could be submitted to the Commission during the moratorium period.

parties opposed the proposed three-year moratorium on new applications for all general purpose and most special purpose earth stations by arguing that any moratorium could give to Comsat an anticompetitive head start in the earth station services market.

C. Recent Developments

10. Several recent developments in the international telecommunications arena, some of which we noted in the NPRM, highlight both the tensions which exist within ESOC and the need for us to re-examine our current earth station ownership policy. First, on April 9, 1984, we denied applications filed by RCA and WUI for review of an order issued pursuant to delegated authority by the Chief, Common Carrier Bureau[15] which resolved a dispute among WUI, RCA and Comsat relating to the financing of U.S. earth stations that operate with the INTELSAT system.[16] In that order, we also denied the requests of RCA and WUI that we reallocate ownership shares within ESOC, noting that while RCA and WUI had made whole their capital accounts, the immediate *Earth Station Ownership* proceeding was the appropriate vehicle by which to consider any new ownership scheme. On August 1, 1984, RCA filed a petition for immediate interim relief which requested the reallocation of ownership shares.[17] Second, in an item accompanying the NPRM, the Commission granted Comsat's application to provide INTELSAT Business Service (IBS) space segment capacity to U.S. carriers to enable these carriers to establish for their customers dedicated international earth stations to carry all types of

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[15] Memorandum Opinion and Order, In the Matter of Joint Request of Communications Satellite Corporation and RCA Global Communications, Inc., to Resolve Dispute Concerning the Manner by which Capital Contributions for International Earth Station Facilities may be Adjusted, Mimeo 1202 (released December 9, 1983).

[16] The Commission affirmed the Bureau's finding that an ESOC member cannot, in accord with Commission policy, unilaterally suspend its capital contributions and compel the remaining joint owners, including Comsat and AT&T, to absorb any resulting shortfall. We found that such withholding of funds is tantamount to a forced ownership realignment and is thus contrary to Commission orders which expressly require an ESOC member to petition the Commission for an adjustment of ownership shares. The Commission also denied the RCA request for stay pending court review. Memorandum Opinion and Order, Mimeo. 34410 (released April 9, 1984). On April 26, 1984, RCA filed a Petition for Review in the United States Court of Appeals for the District of Columbia of the Commission's April 9, 1984 order. Case No. 84-1162 (D.C. Cir.).

[17] The Commission released a Public Notice requesting comment on RCA's petition. I-S-P-84-006 (released August 17, 1984). In response to this notice, comments were filed by AT&T, WUI, RCA, ITT, and Hawaiian. Reply comments were filed by AT&T, WUI and RCA, with RCA filing late. Today, in this proceeding, we grant RCA's motion for leave to file late reply comments. *See* para. 41, *infra.*, for discussion of the ESOC capital contributions dispute.

digital communications services.[18] Third, the Commission granted the applications filed by Comsat and a number of carriers to construct and operate IBS earth stations in the United States.[19]

11. Fourth, on January 13, 1984, the United States Court of Appeals for the D.C. Circuit vacated and remanded our August 19, 1982 Report and Order in the *Authorized User* proceeding[20] in which we had decided to permit Comsat to offer end-to-end service to the public through a separate subsidiary and require Comsat to offer basic INTELSAT transmission capacity at U.S. general purpose earth stations to both carriers and non-carrier users pursuant to a single tariff to be filed with the Commission. While upholding our legal position, the court found that we had abused our discretion by not considering, prior to implementing our *Authorized User II* policy, issues under examination in two inquiries then pending before the Commission, *Direct Access* [21] and *Earth Station Ownership,* which the court found to be directly related to the issues in *Authorized User II.* We subsequently released an NPRM in the *Earth Station Ownership* proceeding and a Report and Order in the *Direct Access* docket.[22] We then issued a Further Notice of Inquiry soliciting

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[18] In the Matter of the Application of the Communications Satellite Corporation for Such Authority as may be Necessary for it to Participate in a Program to Provide Satellite Capacity for New Digital Business Services as part of the INTELSAT System, FCC 84-124, Mimeo. No. 34374 (released April 11, 1984).

[19] Communications Satellite Corporation, FCC 84-124, Mimeo No. 34374 (released April 11, 1984); International Relay, Inc., FCC 84-125, Mimeo No. 34388 (released April 11, 1984); Communications Satellite Corporation, FCC 84-126, Mimeo No. 34390 (released April 11, 1984); ITT World Communications, Inc., Mimeo No. 5197 (released July 6, 1984); TRT Telecommunications Corporation, Mimeo No. 5195 (released July 6, 1984); International Relay, Inc., Mimeo No. 5194 (released July 9, 1984); Satellite Gateway Communications, Inc., Mimeo No. 6305 (released August 31, 1984).

[20] ITT World Communications Inc. v. FCC, 725 F. 2d 732 (D.C. Cir., Jan. 13, 1984) ("*Authorized User II Opinion* "), *vacated and remanded* Proposed Modification of the Commission's Authorized User Policy concerning Access to the International Satellite Services of the Communications Satellite Corporation, 90 FCC 2d 1394 (1984) ("Authorized User II"), *revising* Authorized Entities and Users, 4 FCC 2d 421 (1961), *recon. in part* 6 FCC 2d 593 (1967) ("*Authorized User I* "). On March 27, the Court of Appeals denied our petition for rehearing.

[21] Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982) (Notice of Inquiry).

[22] Subsequent to the issuance by the Court of Appeals of *Authorized User II Opinion,* we adopted a Report and Order in the *Direct Access* proceeding in which we concluded that none of the "direct access" proposals, *i.e.,* bases, capitalized leaseholds, indefeasible rights of use (IRUs), or direct investment in INTELSAT, would serve the public interest. *In the Matter of Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers,* 97 FCC 2d 296 (released April 25, 1984) at para. 3. We stated that as to those concerns upon which proponents of direct access based their support, we would consolidate into the *Comsat Structure* proceeding and the immediate *Earth Station Ownership* proceeding measures alternative to direct

comment on the impact of our actions in the *Direct Access* order and *Earth Station Ownership* NPRM on our proposed *Authorized User II* policy.

D. Notice of Proposed Rulemaking

12. Upon review of the responses addressing the classification scheme proposed in the NOI, we found that the proffered classes did not adequately reflect the future earth station environment. We thus tentatively adopted a more practical classification scheme based on prevalent technology, *i.e.*, IBS, television, and multi-purpose earth stations. We also identified in the NPRM several legal, policy, technical, economic, and operational concerns that interested parties had for the most part addressed in their responsive pleadings to the NOI. We then proferred and discussed our tentative conclusions based upon a thorough review of both our earth station ownership policy and the comments submitted in response to the NOI. We stated in the NPRM that our overriding concern in 1966, the successful establishment of a global satellite system, may no longer, in 1984, justify a rigid policy under which Comsat is a fifty percent owner and sole operator of U.S. international earth stations. We noted that INTELSAT is now a financially and operationally sound organization with over 100 members and its own management staff and that recent innovations in satellite and earth station technology have made technically feasible greater carrier participation in earth station ownership and operation. We further stated our belief that a more open and flexible ownership/operation policy would increase intramodal competition (i.e., increased competition among providers of satellite services) thereby serving to encourage innovation, promote efficiency and create a downward pressure on rates. Finally, we noted that intermodal competition may also be increased by our proposed policy as satellite services are provided more efficiently.

13. We tentatively concluded in the NPRM that the adoption of a more open and flexible earth station ownership policy which relies on competitive forces is consistent with the Communications Act of 1934 and the Communications Satellite Act of 1962.[23] We tentatively concluded that

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access which should enhance the position of the end-user as well as Comsat's carrier customers. We emphasized, however, that in terminating the *Direct Access* inquiry we were not foreclosing our reconsideration of direct access should our alternative measures prove ineffective. *Direct Access* at para. 3.

[23] The Commission's authority over international earth stations within the United States is found in Titles II and III of the Communications Act of 1934, as amended, and Titles I, II, and III of the Communications Satellite Act of 1962, as amended. Section 201(c)(7) of the Communications Satellite Act, in particular, directs the Commission to "grant appropriate authorization for the construction and operation of each satellite terminal station, either to the corporation (Comsat) or to one or more authorized carriers or to the

individually owned and operated IBS and television earth stations are technically feasible, create few, if any, significant economic or efficiency problems, will not significantly affect our foreign partners in INTELSAT, and will result in lower cost and technically superior services to consumers. With regard to multi-purpose stations, we stated that many of these concerns would likely arise. We proposed that Comsat be required to file cost-based tariffs for INTELSAT space segment usage through its World Systems Division and file earth station tariffs through a separate subsidiary acting as an international service carrier.[24] In the NPRM, we recognized that AT&T occupies a unique position in the international arena because it is the major owner of cable facilities, the primary source of international traffic, and is by far the greatest user of international earth station and space segment capacity. We also recognized that diversion of its traffic from existing stations could adversely impact on the public interest. We therefore requested comments addressing this potentiality. We also tentatively concluded that a moratorium on accepting applications as proposed by Comsat was unwarranted.

14. We tentatively concluded that it would be in the public interest to accept applications for IBS and television earth stations from any carrier and to process these applications in a routine fashion.[25] We also tentatively concluded that applications for multi-purpose earth station should be subject to a more rigorous review of economic, technical, and operational considerations.[26] While we discussed certain authorization

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corporation (Comsat) and one or more of such carriers jointly, as will best serve the public interest, convenience, and necessity."

[24] With regard to the unbundling of tariffs, the Commission sought Comsat's comments on how it might proceed in this respect. Specifically, we requested that: (a) Comsat submit sample tariffs with accompanying explanation of the methodology employed; (b) identify and explain all expenses and costs wholly associated with space segment and earth segment services; and (c) identify and describe costs of all activities common to earth station, space segment, and other services, with costs to be apportioned reasonably among all services. We also proposed: (a) the separation of Comsat's competitive earth station activities from its monopoly space segment activities; (b) that all Comsat applications for new stations or for additions to existing stations be made through a Comsat subsidiary, and; (c) that Comsat transfer any ownership interests in existing INTELSAT stations from WSD to a separate subsidiary and that such proposed transfer be submitted to the Commission for review.

[25] We proposed that applications for IBS and television earth stations would be granted upon a showing of minimal legal and financial qualifications of the applicant and technical qualifications of the proposal, as required by Sections 308 and 319 of the Communications Act of 1934. In fact, due to strong public interest considerations, we granted applications to construct and operate IBS earth stations, conditioned on the outcome of this proceeding.

[26] We proposed to closely examine each application for an independently owned multi-purpose station to determine, on a case-by-case basis, whether its construction and operation would result in technical inefficiencies and/or economic harm to existing

criteria relevant for multi-purpose stations, we particularly requested comment on the possible relevancy of such other factors as traffic and revenue diversion among stations and AT&T's unique position in the international market. As to the future of ESOC, we proposed to permit, in the first instance, the ESOC joint owners to negotiate among themselves the future of ESOC. We indicated that absent a unanimous agreement of the owners to retain, modify, or dissolve ESOC, any individual owner could submit a proposed plan to the Commission for our consideration.[27] Finally, we tentatively concluded that Comsat should continue to represent the United States at INTELSAT meetings with continued government monitoring of its role. We also favored greater carrier/public input into INTELSAT policy, tariff, and procurement decisions through the instructional process and sought additional comments on this issue.

E. Responsive Pleadings

15. In response to the NPRM all parties, to some extent, supported the development of a competitive international earth station market and its attentive lower costs of services and increased use and viability of the satellite system.[28] Most of the respondents favored the classification scheme proposed in the NPRM which separated earth stations into three classes based upon prevalent technology: television, IBS and multi-purpose.[29] The scheme was to be employed when addressing technical and other issues raised by the parties as well as in proposing application

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stations that might outweigh the public interest benefits otherwise accruing from the proposed station. We determined that with respect to IBS and television stations, space segment efficiency and traffic diversion from multi-purpose to IBS and television stations are not significant issues.

[27] We noted that the ultimate disposition of ESOC would not be allowed to disrupt service to users or to unduly delay or hinder the institution of independent carrier ownership of new earth stations. NPRM at para. 44.

[28] We note that Equatorial Communications Systems (Equatorial) initially filed comments in support of deregulation of international receive-only earth stations located in the United States in the Earth Station Ownership proceeding. Equatorial subsequently filed a petition for rulemaking requesting that we revise Part 25 of our Rules to permit U.S.-based receive-only satellite earth stations to receive signals from any INTELSAT satellite without being licensed or otherwise individually authorized by the Commission. *See* Petition for Rulemaking of Equatorial Communication Service, Rulemaking No. 4845 (released August 16, 1984). Equatorial requests that we resolve this issue in the immediate proceeding as parties have had opportunity for comment on its petition. We shall deny this request. We do not believe that the record is sufficiently complete for us to act on Equatorial's petition. Moreover, Equatorial's rulemaking petition has created a separate proceeding in which we may comprehensively examine its proposal.

[29] IRI, ITT and TRT stated that the Commission's classification plan could, in the future, become too restrictive on the scope of services to be offered by competitive facilities, i.e., the classifications may not adequately reflect INTELSAT's service practices in the near future, and might, as a result, foreclose the most efficient use of independent facilities. IRI further stated that the plan imposes an undue burden of requiring repeated

evaluation criteria. A majority of the respondents favored the Commission's two-tiered application approach under which applications for television and IBS earth stations would be processed on a routine basis while applications for the construction of multi-purpose earth stations would be subject to a more rigorous review.[30] Some parties, principally AT&T, favored extending expedited processing to all types of earth stations.[31] As to the criteria that should govern the consideration of IBS and television applications,[32] there was general agreement that these earth station applications should be reviewed for the minimal legal and financial qualifications of the applicant and technical qualifications of the proposal. As to multi-purpose applications, some parties suggested use of the IBS/television standards. However, most parties, including NTIA and Comsat, agreed with our proposal to more rigorously review these applications.[33] Further, most parties addressing the issue of an applicant's dominant status stated that Commission review should take due account of an applicant's monopoly or dominant status[34] and the potential for diversion of traffic from existing ESOC earth stations. Comsat argued that AT&T, as provider of approximately 90 percent of all international satellite traffic and as major owner and operator of cable facilities, should be barred from owning and operating earth stations since such a scheme would necessarily result in the domination of both international cable and satellite facilities by AT&T. According to Comsat, there is no real competition in the international voice market and thus permitting AT&T to divert traffic to its own earth stations would not be a natural and benign consequence of marketplace forces.[35] RCA, for the same reasons

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applications for the purpose of incorporating new service techniques. IRI, comments at p. 17; TRT, comments at p. 3.

[30] ITT, the Networks, Equatorial, NTIA, HBO, Federal Express, and Comsat. Comsat would favor extending routine processing only to applications for earth stations which would provide *exclusively* IBS or television service.

[31] AT&T, IRI, RCA, TRT, and NTIA. RCA would favor extending routine processing to applications for multi-purpose earth stations by all carriers except for AT&T.

[32] AT&T argued that the Commission should not scrutinize applications for new multi-purpose earth stations in a manner disparate from that employed for other classes of international earth stations in that technological advancements in earth stations and satellite technology, especially TDMA/DSI, makes efficiency concerns irrelevant. AT&T also claimed that the INTELSAT charging policy provides a satisfactory mechanism for compensating inefficiencies.

[33] While agreeing with the need for a more thorough evaluation of multi-purpose earth station applications, some parties stated that there were sufficient safeguards already in place via the INTELSAT Agreements, tariffs, and the marketplace, to ensure the continued overall efficiency in the near term of the INTELSAT system and to dispel any concern of premature saturation.

[34] Comsat, RCA, and ITT.

[35] AT&T argued that the Commission should disregard the impact of traffic diversion when considering applications for multi-purpose earth stations (1) since AT&T's own economic

proffered by Comsat, proposed a five-year moratorium on AT&T's ownership and operation of earth stations.[36]

16. With regard to the future of ESOC, the parties unanimously supported the Commission's proposal to permit negotiations by the ESOC joint owners to determine ESOC's future. Several parties submitted proposed frameworks for such negotiations.[37] The parties were generally concerned with continuity of efficient, high quality service at reasonable

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interest in ESOC will temper the massive sudden diversion of traffic from existing ESOC earth stations; (2) since what diversion may occur will be offset by traffic growth in the system (a view supported by IRI, MCII, ASC, NTIA and Federal Express); and (3) because AT&T is the major source of international satellite traffic, restrictions on its use of less costly and more efficient earth stations will be detrimental to a large number of customers, and thus, not be in the public interest. In its reply comments, AT&T stated that it is willing to become sole owner of certain mainland ESOC stations and is prepared to negotiate with the other owners for the purchase of those stations. Comsat, in its reply comments, argued that AT&T's assertion with regard to traffic diversion does not provide an appropriate basis for the promulgation of policy on this issue and that AT&T has relied on overstated traffic forecasts. Comsat also argued that AT&T's scheme would result in an AT&T-dominated system, that existing earth stations, built basically to accommodate AT&T's traffic, could not remain financially viable on the basis of the remaining (non-AT&T) traffic. Comsat also rejected NTIA's suggestion that the Commission disregard AT&T's investment in other telecommunications technologies when considering multi-purpose applications. Comsat averred that AT&T control of both cable and satellite facilities would hamper intermodal competition.

[36] AT&T argued that with any granting of authority to Comsat for the construction/operation of an earth station should be the concomitant requirement that Comsat offer INTELSAT capacity on a full and partial transponder basis, based on equivalent voice channels and to offer such capacity in its unbundled space segment tariff. AT&T, comments at page 16. Both RCA and Comsat rejected AT&T's proposal. In its reply comments, RCA stated that this proposal would in practical terms primarily benefit AT&T since AT&T is the only carrier with sufficient traffic volumes to take advantage of partial or full transponder capacity. RCA also claimed that granting this proposal would enable AT&T to extend its current MTS monopoly into the now competitive international leased channel market. Comsat averred in its reply comments that (1) the issue was not raised in the NPRM and, therefore, cannot be a proper subject for discussion and resolution in the forthcoming order, and (2) INTELSAT does not now offer such capacity for international services and is only considering such an offer for IBS. Comsat concluded that there is nothing in the record regarding the terms on which capacity might be available or the implications of such an offering.

[37] AT&T proposed that prior to the Commission's final order in this docket, the joint owners meet to identify and evaluate various proposals for dissolution of ESOC, including sale and exchange of ownership interests and joint ownership of some stations, and then prepare and submit to the Commission a proposal for its approval. AT&T also identified a series of specific items of concern. The owners would implement the plan subsequent to Commission approval, at which time the transition period, if needed, would begin. Comsat stated that negotiations should be authorized without imposing time constraints on meetings during the pendency of this proceeding. After the termination of the proceeding, Comsat stated that the Commission should require prompt reporting of the discussions' status and evaluate such progress. Should no agreement be made, the Commission should prescribe a solution. Both Comsat and AT&T noted that the owners

rates, and equitable access[38] to the existing ESOC stations. There was also a consensus of opinion that the development and approval of an ESOC transition plan should not hinder or delay the progress of the Commission in considering and granting applications for independent earth stations. All respondents rejected Comsat's proposed "moratorium" on applications for construction of multi-purpose earth stations, claiming it would be anticompetitive.[39]

17. Several parties commented on the appropriate structural form for Comsat's participation in the competitive ownership and operation of earth stations, e.g., whether Comsat's current ownership share of general purpose earth stations should be transferred from the WSD to a separate subsidiary and whether Comsat's ownership of new earth stations should be in the WSD or a separate subsidiary. Most parties endorsed our proposal that Comsat's competitive earth station activities be separated from its monopoly space segment activities to minimize cross-subsidization between the emerging competitive activity for earth station services and the monopoly provision of space segment services. AT&T and RCA proposed a transitional arrangement under which Comsat's ESOC earth station ownership could be retained in WSD until the dissolution of ESOC, while competitive (new) earth station investments would be through a separate subsidiary. Most parties also proposed that we closely scrutinize any investment transfers and tariff filings to ensure that cross-subsidization does not occur between earth station and space segment operations.[40]

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met on May 29, 1984, in an effort to establish a framework for discussion and have agreed to report to the Commission on the progress of their discussions.

[38] Section 201(c)(2) of the Communications Satellite Act of 1962, 47 U.S.C. §721(c)(2) requires that the Commission:

> "insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations under just and reasonable charges, classifications, practices, regulations, and other terms and conditions and regulate the manner in which available facilities of the system and stations are allocated among such users thereof."

[39] Comsat initially urged a three-year transition period to allow the marketplace to adjust to the change in regulatory philosophy and stated that although the Notices and other parties labeled its proposal a "moratorium," Comsat merely contemplated a transition period for the processing of applications. Comsat, in its comments to the NPRM, stated that under a case-by-case analysis of applications for multi-purpose stations, the Commission could begin processing those applications at the termination of this proceeding. *See* fn. 70, *infra.*

[40] The parties generally agreed that a rigorous investigation of Comsat's space segment rates should be made and that Comsat's sample tariff failed to provide adequate assurances that (1) Comsat's allocation of costs for its monopoly services are accurate and reasonable and do not reflect cross-subsidization; (2) the cost allocation between the ground and space segments is accurate and reasonable; and (3) the rates are fairly derived from valid demand projections, are reasonable for each use of its different

Comsat argued that the ownership and operations of its multi-purpose earth stations should be permitted to remain in WSD. However, Comsat did not object to placing the ownership and operation of IBS and television earth stations in a separate subsidiary providing non-monopoly service. With reference to the separate subsidiary proposal found in our *Authorized User II* proposal for end-to-end services, Comsat favored WSD being limited to providing multi-purpose earth station and space segment services and one separate subsidiary providing end-to-end and IBS/television earth station services. Comsat argued that an arms-length separation between management of earth station and space segment services would impede the coordination and efficiency currently obtained through a single entity.[41]

18. All parties with the exception of Comsat supported the Commission's proposal that should non-ESOC or Comsat entities be authorized to construct and operate international earth stations, Comsat should unbundle its tariffs so as to enable carriers to obtain space segment capacity separate from earth station capacity. In so doing, the parties have gone to great lengths to advise us of Comsat's tendency to exceed its allowable rate of return and that it has rarely resisted prior temptations to overburden users of its monopoly services in order to support its competitive ventures.

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services, and reasonably reflect services justifiably chargeable to Comsat's monopoly ratepayers. ITT also submitted a lengthy set of questions for Commission investigation. ITT reply comments at page 20. (*See* comments of ITT, RCA, Hinchman, AT&T, IRI, MCII.) MCII called for the immediate unbundling of rates even though an earth station policy has not yet been formulated. With regard to the manner by which to arrive at a lawful tariff, MCII and WUI stated that the Commission should refrain from rate-averaging, at least prior to any rate filings by carriers. WUI suggested that the Communications Satellite Act restricts the Commission from prescribing rate-averaging prior to a rate filing while Hawaiian argued that the Act does not restrict the prescription of rate averaging prior to rate filings, and that the Commission should maintain a policy of rate averaging for existing general purpose earth stations in order to assure continued viable rates and services to lower traffic areas, such as the Pacific Ocean region. IRI favored using the INTELSAT Utilization Charge (IUC) as a benchmark from which to derive a lawful tariff claiming that the IUC represents Comsat's revenue requirement, on a per circuit basis, for its INTELSAT investment expenses and associated costs.

[41] While recognizing that in some instances competitive activities should be carried out in a separate subsidiary so that the WSD's competitive ventures do not profit at the expense of ratepayers, Comsat claimed that a separate subsidiary requirement is expensive, necessitating a duplication of functions and impeding the overall efficiency of the international satellite system, and that traditional regulatory oversight would obviate the need for such separation. Comsat further stated that a separate subsidiary might be warranted with respect to WSD's ownership of IBS and television earth stations in that intense competition will result from the probable deregulation in the near future. Finally, NTIA stated that a separate subsidiary requirement was unnecessary in that stricter accounting procedures would suffice to ensure that cross-subsidization does not occur.

19. With regard to the issue of what the proper role of Comsat, as U.S. Signatory to INTELSAT, should be in any ownership arrangement, most parties stated that Comsat should continue to represent U.S. interests in INTELSAT but that the Commission should adopt mechanisms for greater carrier/operator and public participation in the formulation of U.S. positions in INTELSAT. A variety of mechanisms were proposed by the respondents which reflect varying degrees of carrier/operator and public involvement in both Comsat/INTELSAT forums and the instructional process. There was general agreement that there should be significantly greater access to INTELSAT documents and meetings and greater input into INTELSAT planning and coordination functions. While Comsat favors greater carrier input,[42] it stated that the instructional process should not be altered pending the completion of an ongoing congressional inquiry and the efforts of an inter-agency task force.

II. Discussion

A. Overview

20. The Communications Satellite Act of 1962 charges the Commission with the responsibility of establishing an earth station ownership policy which best serves the public interest.[43] The joint ownership arrangement that we established in 1966, and which was implemented by the carriers in 1967, addressed the needs of a nascent satellite telecommunications industry. We found that a joint ownership scheme would expedite the "establishment of an effective and efficient global satellite communications system" and assist the "orderly development of a comprehensive complex of earth stations."[44] We envisioned the involvement of carriers other than Comsat in international earth station management and ownership and sought to allow these carriers the opportunity to obtain experience in satellite communications and to provide them incentives to maximize their use of satellite technology.[45] We have, however, always recognized the dynamic nature of the satellite and earth station technologies. We have witnessed the development of larger, more reliable and efficient satellites, smaller earth stations and new services. We have also witnessed the transformation of INTELSAT from an organization with

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[42] Comsat has developed a program to increase public access to information regarding INTELSAT and its activities as well as Comsat's actions as U.S. Signatory, discussed at para. 48, *infra.*

[43] 47 U.S.C. § 721(c)(7) provides that the Commission shall: "Grant appropriate authorization for the construction and operation of each satellite terminal station, either to the Corporation (Comsat) and one or more authorized carriers or to the Corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity."

[44] *Second Report and Order,* 5 FCC 2d at 817.

[45] *Second Report and Order,* 5 FCC 2d at 816, 818-820.

few members managed by Comsat to a financially stable entity with its own management staff and over one hundred members.[46] In such a new environment we believe that a review of our existing earth station ownership policy is timely.

21. We conclude here that a liberalized earth station ownership policy which permits the construction and operation of earth stations outside of ESOC would benefit users by increasing carrier and service options and creating competitive pressures on rates. We also conclude here that such a policy is consistent with our INTELSAT obligations and can generally be implemented without adverse impact on service quality or efficiency. In effectuating this policy, we will allow competition consistent with our statutory objectives for existing and new earth stations, and will consider applications from any carrier. We will accept applications to provide IBS and television services and process such applications in a routine fashion. We will employ a more rigorous review, on a case-by-case basis, of applications for multi-purpose stations. We shall reallocate ESOC ownership shares in proportion to the joint owners' current usage of the ESOC facilities and then permit the ESOC joint owners to negotiate among themselves the future of ESOC. We shall require that Comsat file cost-based tariffs for INTELSAT space segment usage through its World Systems Division and file earth station tariffs through a subsidiary acting as an international service carrier. We further mandate: (a) that Comsat separate its competitive common carrier earth station activities from its monopoly common carrier space segment activities; (b) that all Comsat applications for new stations or for modifications to authorized stations be made through a Comsat subsidiary; and (c) that Comsat transfer any ownership interests in existing INTELSAT stations from the WSD to a separate subsidiary and that the mechanics of such proposed transfer be submitted to the Commission for review. While we are cognizant of the need for a smooth transition from one ownership arrangement to another, we shall not impose a moratorium period on any application for the ownership and operation of earth stations. We will also not impose any pre-filing restrictions on AT&T although we recognize that AT&T applications for multi-purpose earth stations may raise unique issues. We conclude that Comsat should continue to represent the United States at INTELSAT meetings with our continued monitoring of its role. Further, we find that it is appropriate to facilitate greater carrier, operator, and public input into the instructional process and INTELSAT decisions. Finally, we conclude that owners of international earth stations may attend the annual meetings of the Operational Representatives that

[46] INTELSAT has grown from 19 member countries in 1964 to 109 members in 1984, and the net investment in its space segments has grown from $69 million in 1967 to $1.5 billion in 1984.

address operating and coordinating matters that relate to space segment and earth stations.

B. Legal Considerations

22. Titles II and III of the Communications Act of 1934, as amended, and Titles I, II, and III of the Communications Satellite Act of 1962, as amended, grant to the Commission authority over international earth stations within the United States. Section 201(c)(7) of the Communications Satellite Act directs the Commission to "grant appropriate authorization for the construction and operation of each international satellite terminal station, either to the corporation (Comsat) or to one or more authorized carriers or to the corporation (Comsat) and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity." These statutory options and the statutory history make it clear that Congress expressed no preference for which ownership arrangement we should permit when it enacted this section and that the Commission was given the discretion to determine the ownership scheme which would best serve the public interest. Inherent in this grant of authority are the twin responsibilities of: (a) using our expertise and discretion to establish an initial earth station ownership policy which served the public interest; and (b) modifying that policy as warranted by changes in the facts and circumstances underlying the original formulation of the policy.[47]

C. Policy Considerations

23. A more flexible ownership scheme which permits independent earth station ownership outside of ESOC as market forces dictate and the public interest requires would foster innovation, establish more service and carrier alternatives for users, and create a downward pressure on earth station costs and rates. Thus, we would encourage the development of a market where earth stations could be owned with Commission approval by ESOC, by individual carriers, by Comsat or by any Comsat/carrier combination. We believe that Comsat's filing of a cost-based, unbundled tariff coupled with the opportunity for carriers to construct their own earth stations at locations of their choosing will foster the establishment of efficient networks and result in substantial savings for users. While we are aware of the need for both a smooth transition and the consideration of public interest factors when reviewing specific applications, the record in this proceeding demonstrates that new forms of

[47] As we have already noted in the NPRM, these changes would include advances in earth station technology, the feasibility of competition in the provision of earth station services and facilities, the impact of a new policy within INTELSAT, the quality and price of service to users, the development of intramodal and intermodal competition in the international marketplace, foreign policy and national security considerations, and interference, compatibility and connectivity requirements.

ownership for all types of earth stations which access the INTELSAT system will serve the public interest.

24. Our experience has been that the introduction of competition in the provision of international services, or a segment of an international service, produces real benefits for users. In the last several years we have permitted the international record carriers to provide international service from all points in the United States (*Gateways*);[48] we have removed restrictions on AT&T's provision of international record services (*TAT-4 Revisited*);[49] and we have authorized new entrans for the provision of international record and voice services (Western Union, Graphnet, MCII, SBS, GTE Sprint, etc.). We have taken steps to assure that competitive activities will not be subsidized by monopoly offerings (*Comsat Structure*)[50] and information useful to competitive entities in the United States will be quickly and fairly disseminated (*Information Flow*).[51]

25. The central policy issue addressed by the respondents was whether earth station capacity can and should be provided by any entity other than ESOC. Comsat has maintained throughout this proceeding that the unrestricted independent ownership of U.S. international multipurpose earth stations could hamper the efficient, reliable and cost-effective operation of the U.S. earth station network and adversely affect the optimum utilization of the INTELSAT space segment. However, Comsat has stated that other carriers' applications could be considered following a transition period and be granted if they satisfy a strict public interest standard. Other respondents contended that a more liberal ownership and operational plan for new and existing stations would better address the needs of international satellite users without compromising the efficiency of the INTELSAT global system. After a careful review of our earth station ownership policy and the responsive filings in this proceeding, with particular attention to questions relating to earth station and space segment efficiency, we conclude that a restrictive ownership policy is no longer warranted, that substantial benefits to users will flow from a more open and flexible earth station ownership policy, and that this new policy can be implemented in such a way as to ensure earth station and space segment efficiency. We more fully explain the technical considerations on which this policy conclusion is made in the following section.

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[48] 76 FCC 2d 115 (1980), *aff'd sub nom. Western Union Telegraph Company v. FCC*, 655 F. 2d 1126 (D.C. Cir. 1981).

[49] 92 FCC 2d 641 (1982).

[50] 90 FCC 2d 1159 (1982) and 97 FCC 2d 145 (released April 30, 1984).

[51] Id.

D. Technical Considerations

26. For the purpose of addressing technical issues and formulating application review criteria, we adopted in the NPRM a classification scheme which divided earth stations into three classes: multi-purpose, IBS, and television stations. While most respondents supported the use of these categories, some parties argued that the proposed classifications were too restrictive, constrained competition, and were inconsistent with prevailing procompetitive international service policies. We believe that these three classes of service are sufficiently broad to include both existing and future services. As will be emphasized in the section dealing with application criteria, our basic policy thrust is that if an earth station application for the provision of a particular service or services does not raise significant legal, policy, economic, technical or other issues, we would expect the staff to routinely process that application, just as it has done with the recently filed IBS and television earth station applications. On the other hand, if significant issues are raised, then a more rigorous review would be appropriate.

27. The principal technical issue raised by the parties was whether a policy encouraging competition in the provision of U.S. earth station services would have a significant adverse impact on the overall efficiency of the INTELSAT system. Comsat argued that the system's efficiency would decline as the number of earth station antennas accessing a particular satellite increased. Comsat contended that the unrestricted addition of U.S. multi-purpose earth stations would cause fragmentation of major traffic streams which in turn would require a greater number of circuits to transmit the same volume of traffic. Comsat also argued that satellite capacity and design life could be adversely affected by a proliferation of small (Standard B) earth stations that require more powerful satellites or drain more power from existing satellites. Other parties, including AT&T, IRI, and RCA, averred that technological advancements in earth station and satellite technologies, such as TDMA/DSI,[52] make efficiency concerns irrelevant and that the INTELSAT charging policy already provides a satisfactory mechanism for compensating inefficiencies.[53]

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[52] TDMA and DSI are acronyms for time division multiple access equipment and digital speech interpolation equipment, respectively. Use of TDMA, rather than frequency division multiple access (FDMA), increases the number of circuits a given satellite transponder can carry by approximately 50-60 percent. DSI equipment operates in a fashion similar to circuit multiplication equipment used on cables and approximately doubles the number of circuits used for message telephone services.

[53] As we stated in the NPRM, the inefficient use of the space segment can arise from a number of sources. Certain modulation formats for multi-purpose earth stations work more efficiently with one or two earth stations accessing a transponder than with multiple earth station access that one might expect in a competitive environment.

28. We conclude that with respect to television and IBS earth station applications the issue of technical inefficiency is generally irrelevant.[54] However, such inefficiency concerns are real and must be examined when considering applications for multi-purpose earth stations which have in the past utilized mostly Standard A and Standard C antennas. We believe, however, that some increase in the number of new multi-purpose U.S. earth stations operating under today's access arrangements will not necessarily result in a noticeable change in achievable satellite efficiency from that obtainable under our current ownership policy. Nevertheless, efficiency factors such as the type of modulation and multiple access used, the frequency band, the particular satellite and transponder accessed, the type of communications, and the size of the antennas are relevant to our public interest finding and will be examined on a case-by-case basis when considering applications to construct and operate multi-purpose earth stations.

29. We find that advancements in both satellite and earth station technology, such as the further development of multiplexing equipment like TDMA, will enhance the efficiency of multi-purpose earth stations and the INTELSAT system. Such advancements will be considered in reviewing applications. We also believe that there exist additional safeguards within the INTELSAT organization and processes to help assure continued efficiency of the INTELSAT system.[55] We emphasize

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Further, a competitive environment may tend to encourage the use of earth stations smaller than Standard A or Standard C stations for multi-purpose service which, in some situations, do not achieve the satellite efficiencies that could be achieved with the larger stations. INTELSAT does discourage overly wide use of small stations for voice-grade service by exacting a space segment surcharge for circuits transmitted from or received by these stations. The degree of inefficiency that might be generated by new earth stations in a competitive environment would depend upon such factors as the type of modulation and multiple access used (*i.e.*, FDMA vs. TDMA), the frequency band (*i.e.*, 6/4 GHz vs. 14/11 GHz), the ocean region, the particular satellite (*i.e.*, Major Path or Primary), the particular transponder with its connectivity requirements (*i.e.*, few vs. many countries), the type of communications (*i.e.*, analog vs. digital), and the size of the antennas on both the U.S. and foreign ends (*i.e.*, Standard A, Standard B, Standard C, or others).

[54] With regard to IBS earth stations, INTELSAT anticipates a multi-earth station service and has already evaluated considerations of satellite efficiency. It has arrived at space segment prices that compensate it for the full cost of space segment associated with each type of IBS earth station. As to television service earth stations, the number of television channels which can be derived from a transponder is generally independent of the number or size of earth stations accessing the transponder. Ordinarily, two earth stations can access the same transponder, thus, the operational nature of this service does not pose a significant inefficiency issue.

[55] We note that INTELSAT can discourage overally wide use of small earth stations or other inefficient modes of operation by exacting space segment charges for circuits transmitted from or received by these stations. Further, earth station must meet INTELSAT's technical performance standards prior to accessing the INTELSAT

that our jurisdiction over this matter will continue and that we have the ability to re-examine how technical factors will be evaluated in the application process.

30. A second technical issue relates to technical coordination of new earth stations with the INTELSAT system and its Signatories. At the present time, technical coordination is a five-step process. First, an earth station application is filed and its construction and use is authorized. Second, the technical characteristics and specifications are presented to INTELSAT by Comsat, the U.S. Signatory. Third, the earth station is built and is tested. Fourth, INTELSAT reviews the test results and, if the results are satisfactory, approves the use of the earth station with the INTELSAT system. Finally, the earth station is coordinated (frequencies, antennas and transponders) with other Signatories. We do not envision any significant modification of this procedure. We would expect each owner/operator to work with Comsat to transmit test results to INTELSAT and to coordinate frequencies, antennas and transponder data with other owners. While the integration of earth station and reference station[56] operations and technical coordination of U.S. earth stations into the INTELSAT system does not pose technical problems, there might arise questions as to operational coordination, planning, and owners' responsibilities. The issue of operational coordination is discussed at para. 39, *infra.*

31. We note that Comsat has recently published and distributed its "Digital Express User's Guide" which describes the process for activation and operation of Digital Express (IBS) earth stations and includes references to information on technical performance standards. It appears that this publication will assist the integration of IBS earth stations into the INTELSAT system. The publication states that Comsat provides guidance and assistance on activation and operation of such stations and such follow-on services as operational planning, provision of space segment capacity, and maintenance of network integrity in collaboration with correspondent administrations.

E. Economic Considerations

32. The economic issues addressed by the respondents concern the costs and benefits of independent ownership both to the participants in the INTELSAT system (both Signatories and international carriers) and to users of the INTELSAT system. Of central concern were the additional

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satellite. *See* INTELSAT Operating Agreement, Art. 14(a); Procedures Governing Application, Approval, Verification, and Operation of Earth Stations in the INTELSAT System, INTELSAT Doc. BG-35-82 (Rev. 2) (March 18, 1981).

[56] A "reference station" is a TDMA earth station within a network of TDMA earth stations that acts as a standard, or reference, for the timing of all of the stations' transmissions.

costs for foreign administrations (PTTs) and revenue diversion. As to additional costs for the PTTs, Comsat has argued that the PTTs will be adversely affected by our more flexible earth station ownership policy since foreign earth stations would require additional equipment to operate with new U.S. stations.[57] Notwithstanding this claim, we note that the expenditure of additional funds and the interconnection with new entrants are decisions to be made by the PTTs. Thus, for the operation of any new U.S. earth station, a willing foreign partner must exist. Foreign administrations, in order to increase their revenues, may show a greater willingness to enter into operating agreements with U.S. carriers which provide new services, have distinct customer bases and own their own earth stations. Further, new entrants and increased competition in the United States should increase demand for all INTELSAT services and thus increase revenues for both INTELSAT and its members.[58]

33. The major economic consideration is the potential for traffic and revenue diversion from existing ESOC earth stations to new earth stations.[59] Because of the size of carrier investments and the nature of the operations of the ESOC joint owners, we anticipate that the issue of revenue diversion would most likely arise under the following scenario: ESOC continues and AT&T files an application to construct and operate a new multi-purpose earth station with the intention of diverting its traffic

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[57] Comsat claimed that an increase in costs to the PTTs would result from their need to procure additional equipment to operate with new U.S. earth stations, thus creating an economic disincentive for these PTTs to enter into operating agreements with U.S. earth station operators.

[58] Comsat also argued that the use of a greater number of circuits to carry the same amount of traffic would accelerate satellite saturation schedules and accelerate the purchase by INTELSAT of additional space segment (satellite) capacity. This additional capacity would be partially (24%) funded by Comsat and would increase Comsat's space segment rate base, revenue requirement and charges. In response to this argument we must state that we doubt additional space segment capacity beyond that already planned by INTELSAT will have to be procured as a result of our new ownership policy. First, IBS is priced in a manner which anticipates inefficient use of the space segment. Second, television service does not create inefficiencies. Third, it is probable that the INTELSAT system will have excess capacity at least for the next several years. Fourth, even if additional space segment would have to be procured, we can not simply conclude that this added cost outweighs other savings to users brought about by our new policy. In fact, we are quite confident that any increase in space segment investment and charges will be offset by reductions in earth station rates and terrestrial hauls. Finally, INTELSAT could adopt a charging policy to generate additional funds necessary for supplemental satellite procurements.

[59] The NPRM solicited comments addressing the issues of: (a) what weight should be accorded potential traffic and revenue diversion when considering authorization applications; (b) whether to treat such diversion as a natural and benign consequence of the market mechanism; and (c) whether to balance the interests of the current providers of earth station capacity with the interests of consumers likely to benefit from more efficient entrants.

from an ESOC facility to its new earth station. The issue presented would be whether revenue diversion would harm Comsat to the extent that earth station or space segment services to the public would be, on balance, adversely affected. If the ESOC co-owners successfully reach a settlement on the future of ESOC, we would anticipate that some arrangements would be included to minimize any economic injury, mooting the issue. However, because of the clear potential for significant revenue diversions that such earth stations may present, we will defer to the application process the question of whether a particular earth station and anticipated traffic diversion would impact Comsat so that overall service to the public would be adversely affected.

34. Comsat contended that some international carriers, AT&T in particular, are apt to divert a substantial amount of traffic from existing ESOC stations to new stations, resulting in significantly reduced revenues and higher rates for the remaining carriers and users of these stations.[60] In response AT&T stated that: (a) its ownership interest in existing earth stations and the dedicated connecting terrestrial facilities will temper massive diversion of traffic from existing ESOC stations; (b) any diversion that may occur will be offset by traffic growth in the system; and (c) restrictions on AT&T's use of less costly and more efficient earth stations will be harmful to a large number of customers. Many potential owners of new earth stations stated that any traffic diversion would generally be offset by increases in international satellite traffic. These parties averred that existing procedures for application approval, economic self-interest and a negotiated transition for ESOC would provide a sufficient safeguard to ensure traffic diversion does not adversely affect users.[61]

35. As we stated in the NPRM[62], the IRCs and AT&T are the ESOC members which originate and terminate traffic. They provide end-to-end service to users in contrast to Comsat which, at present, serves these carriers as a carrier's carrier. The IRCs collectively generate approximately 10 percent of the international satellite traffic. They jointly own approximately the same percent of the existing ESOC stations. Since satellite traffic handled by U.S. earth stations is estimated by INTELSAT to grow in the next several years at an annual rate of approximately 16

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[60] We again note that AT&T is the source of approximately 90 percent of international telecommunications traffic, is the largest owner of underseas cable, and owns the connecting terrestrial lines that link U.S. international earth stations and cables to major population centers.

[61] Most respondents argued that the Commission should at least consider revenue and traffic diversion on a case-by-case basis when determining whether to authorize new earth stations. Application criteria are discussed in greater detail within the context of the future market structure at para. 49, *infra*. Our discussion of the determination of the public interest follows at para. 37, *infra*.

[62] At para. 41.

percent,[63] we conclude that any diversion of traffic by one or more IRCs (or new entrants such as IRI) to new stations is likely to be offset by overall market growth, thus avoiding economic harm to AT&T, Comsat, other ESOC members or the public. For the same reasons we can also conclude that construction and operation by a Comsat subsidiary of a new earth station will not injure the IRCs, AT&T or the public. Furthermore, overall demand for satellite services is likely to increase as new services develop, new entrants enter the market, terrestrial hauls are shortened and intramodal competition develops.

36. We recognize, however, that if ESOC continued in its present form and if AT&T were to divert a substantial percentage of its traffic to a new facility, then Comsat would suffer a revenue loss and the joint owners, the IRCs and AT&T, would suffer a rental payment decrease on their ESOC investments.[64] Yet, if AT&T's current costs of obtaining earth station capacity exceed its total costs under an arrangement where it builds and operates one or more earth station facilities, then independent or non-ESOC ownership of earth stations by AT&T could lead to a more efficient service offering and lower rates to its users. We are cognizant that traffic diversion may result from a policy of independent ownership of international earth stations and the competitive provision of international earth station services. We are also aware that Comsat will suffer a loss of traffic should it engage in overpricing of services.

37. We intend to evaluate specific contentions of revenue diversion in the application process when a particular set of facts are before us. We shall primarily look at the effect of diversion on service to the public rather than the effect on the petitioning carrier. Thus, unless it can be demonstrated that traffic diversion will significantly impact a carrier's ability to provide service to the public and that the public will, on balance, be adversely affected by this occurrence, we do not intend to limit or bar AT&T's (or any other carrier's) entry into the earth station market. The Supreme Court set the standard governing additional competitive entry into a given market by mandating that we determine whether competition is reasonably feasible in those markets sought to be served and that additional competition serves the public interest.[65] The Court stated that

[63] The forecasted annual global growth rate (percent) for INTELSAT traffic is estimated to grow approximately 14 percent. These figures are taken from the "INTELSAT Traffic Data Base Resulting From the 1984 Global Traffic Meeting," released by INTELSAT on August 13, 1984.

[64] Because the IRCs' ownership share in ESOC is relatively small, we can conclude that any rental payment loss suffered by the IRCs due to independent ownership and operation of a multi-purpose earth station by AT&T will not be substantial, will represent only a small percentage of their total revenues, and will not adversely affect their operations or the type, quality or price of services offered to the public.

[65] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) (*RCAC*).

the Commission, in determining whether additional competition is in the public interest, "is not required to make specific findings of tangible benefit ... but must at least warrant ... that competition would serve some beneficial purpose."[66] The Commission, in *Mckay Radio and Telegraph Co.*, 28 FCC 231 (1960) (*Mackay*), stated that the feasibility of competition depends upon whether there is sufficient traffic to support the additional competition and upon the effect of the additional competition upon the applicant as well as all other carriers providing service to the public. In *Telocator Network of America v. FCC*, 691 F. 2d 525 (D.C. Cir., 1982) (*Telocator*) the circuit court reiterated the standard for additional competitive entry:

> [T]he Commission may lawfully allow, and indeed encourage, entry of multiple carriers offering overlapping services, if it has reviewed the characteristics of the particular communications field involved and rationally concludes that competition in that field predictably would further the public interest in larger, more economical, and more effective service. Essentially, the Commission must be able reasonably to forecast, first, that new entry will not so severely impair the economic base of existing carriers that the industry would experience an incidence of failure so high as to impair provision of service to the public and, second, that injection of new providers will probably result in better, cheaper, or more innovative communications offerings. These forecasts must have some ascertainable foundation in the record; at the same time, however, conclusions on the future conduct of licensees, the anticipated reaction of investors, the expected course of technological development, and other assumptions about the functioning of tomorrow's communications market are unavoidably exercises in prediction. For such prognoses, we can require only that the agency's decisional memoranda reveal that it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation (footnotes omitted).[67]

The District of Columbia Circuit Court also employed the *RCAC* standard in approving authorization to construct earth stations for Hawaii - U.S. service.[68] The reasoning in this line of cases clearly indicates that the *RCAC* standard is applicable to the determination of additional competitive entry into the international earth station services market.

38. On the issue of revenue diversion, we do not believe that the public would be adversely affected if Comsat no longer was the sole provider of earth station services. As to the provision of earth station services

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[66] *RCAC*, 346 U.S. at 96-97.

[67] *Telocator*, at 544. *See also In the Matter of Overseas Communications Services*, 92 FCC 2d 641 (1982) (*TAT-4*).

[68] *Hawaiian Telephone Co. v. FCC*, 589 F. 2d 647 (D.C. Cir., 1978). The Commission has employed the *RCAC* standard in approving SBS international service [*In the Matter of Satellite Business Systems*, 91 FCC 2d 940 (1982)]; the direct provision of television service by Comsat [*In the Matter of Spanish International Network*, 70 FCC 2d 2127 (1978)]; and in setting aside both the TAT-4 policy which limited AT&T's international service offerings and any other policy which limited the IRC's offerings [*In the Matter of Overseas Communications Services*, 92 FCC 2d 641 (1982)].

generally, other entities appear eager to construct and operate a variety of earth stations. The provision of earth station services by carriers with customer bases eliminates a middleman and may be the most efficient way to provide service. Further, regardless of the ownership and operation arrangement of international earth stations, all present and future authorized carriers are insured "nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations . . ." pursuant to Section 201(c)(2) of the Communications Satellite Act of 1962, as amended. 47 U.S.C. §721(c)(2). As to the provision of space segment services, we do not believe that the independent ownership of multi-purpose earth stations by AT&T will adversely affect Comsat's ability to provide space segment capacity. We first note that AT&T's large investment in ESOC, which we increase today, may temper any AT&T plan for the major diversion of traffic from an ESOC facility to a wholly owned AT&T facility. We also note the growth in demand for international satellite services and the development of new services. Finally, the placement of Comsat's earth station investment in a separate subsidiary will insulate its earth station offerings from its jurisdictional space segment services which we anticipate would remain a profitable line of business.

39. Another area of concern is the integration of the operations of U.S. earth stations into the INTELSAT system and the obligation of the United States to install new earth station equipment as scheduled by INTELSAT. We do not regard the issue of integration as technical since there is no technical barrier to the ability of earth station owners to coordinate frequencies, antennas, and transponders data with the INTELSAT members. Integration does, however, pose the problem of who should bear the costs of operational coordination (*i.e.*, the costs of additional equipment or reference stations). For instance, as we noted in the NPRM,[69] an issue may arise when INTELSAT, with input from the United States, decides that certain traffic from certain countries should be handled by special modulation formats, such as TDMA. As an operational policy, INTELSAT does not decide which earth stations in a given country should change their formats to meet these requirements. It allows the country to make this decision. With competitive stations, disagreements among the owners may arise regarding who should incur the extra investment. We proposed in the NPRM to permit the station owners to resolve integration matters through negotiations. Subsequently, and only if necessary, would we resolve the matter through our retained jurisdiction and conditioned authorizations. We here affirm that tentative conclusion. Thus, earth station owners will, in the first instance, have the opportunity to resolve integration issues themselves. However, in recogni-

[69] At para. 38.

tion of the importance of these issues, we shall retain jurisdiction over U.S. earth stations and condition earth station authorizations, as necessary, to remedy any integration problem.

F. The Future of ESOC and Other Issues

40. *ESOC:* One of the central issues raised by the transition to a new competitive earth station ownership policy is the appropriate disposition of the ESOC earth station investments. We noted in the NPRM that the owners may opt to retain ESOC, to dissolve ESOC or to establish a "hybrid" ownership arrangement. We reached no tentative conclusion as to which arrangement would be most efficient or best serve the public interest. All respondents addressing this issue supported our proposal of permitting the joint owners to negotiate among themselves the future of ESOC and then submit an agreement to the Commission for our consideration.[70] We continue to believe that comprehensive negotiations among the joint owners are appropriate and we therefore affirm our tentative conclusion to permit negotiations. The more difficult question is what course of action would best serve the public interest if an agreement is not reached. We indicated in the NPRM that after a negotiating period of several months we would consider individual proposals on the disposition of the earth stations. We proposed such a filing to emphasize to the carriers the importance we attach to resolving this issue and to convey to them a sense of urgency. Since the carriers have already initiated discussions it is clear that they share our concern and sense of urgency. Therefore, we need not establish an artificial deadline for the negotiations. We do, however, request the owners to file periodic reports on the state of the negotiations as they have done over the past several months. If these reports indicate that the negotiations have broken down, we will solicit proposals for our consideration. We expect, of course, that any arrangement would be consistent with the antitrust laws and assure the continuance of efficient, high quality service without any disruption at reasonable rates and with equitable access to all earth stations.

41. *ESOC Dispute:* In resolving this limited dispute, we required RCA and WUI to make whole their ESOC capital contribution accounts prior to requesting that we act on their requests to reallocate ownership shares.[71] Having satisfied that condition precedent, RCA and WUI requested, both in this proceeding and a separate Common Carrier Bureau proceeding,[72] that we reallocate ownership shares in ESOC to more accurately reflect

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[70] We note that the joint owners have in fact initiated discussions subsequent to the release of the NPRM. From the pleadings, we can discern that some progress has been made in negotiating the disposition of ESOC. *See* fn. 39, *supra.*

[71] *See* para. 10 and fn. 16, *supra.*

[72] RCA Request for Immediate Interim Relief, I-S-P-84-006 (released August 17, 1984). *See* fn. 17, *supra.*

the current usage of ESOC facilities by the joint owners. In their filings in this docket WUI and RCA indicated their belief that a reallocation of ownership shares would facilitate the ESOC negotiations.[73] We shall today grant this request in this proceeding for three reasons.[74] First, our 1966 policy decision and subsequent orders establish that we have asserted jurisdiction over the existing ownership arrangement and the ownership shares. The ESOC Agreement specifically acknowledges our power to reallocate shares by conditioning the ownership of the existing and additional earth stations "subject to the further order of the Commission."[75] Second, we have always recognized the dynamic nature of the satellite telecommunications industry and stated in our *Second Report and Order* that the quotas prescribed by us are "subject to revision in the light of experience gained and will be expressly subject to reexamination and possible readjustment on the basis of data submitted to the Commission."[76] Reallocation is also consistent with our earlier ESOC orders, that the allocation of ownership shares "is one under which ownership is reasonably related to use."[77] All parties to ESOC agree as to the disparity between the ownership shares initially assigned by the Commission in 1966 based on carrier projections and the joint owners' current usage. Third, because the continued existence of ESOC, in one

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[73] Hawaiian stated that it had no objection to RCA's requested reallocation as long as it did not delay the current ESOC negotiations or prejudge the Commission's policy with regard to the eventual dissolution or rearrangement of ESOC. ITT, which took no position with regard to the ESOC capital contribution dispute between RCA and Comsat, opposed RCA's proposal concerning reallocation of ownership shares in the Paumalu, Hawaii earth station. ITT objected to RCA's proposal that both RCA and ITT receive approximately the same ownership share even though RCA has three times the usage at this earth station. AT&T opposed RCA's request for reallocation, stating that: (a) RCA's request is, in effect, a late filed petition for reconsideration of the Commission's earlier *ESOC Dispute* order; (b) the Commission had already ruled on RCA's reallocation request and RCA thus waived its right for appellate review of the ruling; (c) reallocation would violate the fundamental basis for the establishment of ESOC as a voluntary organization; (d) reallocation is now imprudent in light of the current negotiations to end the present ESOC joint ownership scheme; and (e) RCA's claim that it is overinvesting in ESOC facilities is weak since RCA receives through rental payments paid by AT&T and other non-ESOC carriers a return on the capital which it invests in ESOC. Further, AT&T argued that RCA's investment in ESOC is included in its rate base on which it earns its authorized rate of return.

[74] As we stated in our Capital Contributions Dispute order, Mimeo. No. 34410, *supra.*, petitions for reallocation of ESOC ownership shares would be considered in the *Earth Station Ownership* proceeding. MO&O, *supra.*, para. 9. We have incorporated the responsive pleadings in File No. I-S-P-84-006 into the Earth Station Ownership docket and have decided the reallocation issue in the immediate proceeding on the basis of the public record developed in both proceedings.

[75] Earth Station Ownership Agreement, March 23, 1967, at para. 1.2.

[76] *Second Report and Order,* 5 FCC 2d at 819.

[77] *Second Report and Order,* 5 FCC 2d at 817.

form or another, is a possible outcome of the joint owners' discussions, we believe it equitable to act on these reallocation requests. We note, however, that this reallocation is not intended to suggest our preference as to the future ownership and operation arrangement. We further note that the ESOC negotiations are broad discussions relating to the future operations of ESOC as well as the disposition of ESOC investment shares. While this reallocation of shares may impact the broad negotiations, we do not believe that the effect will be significant or create any major stumbling blocks.

42. The ownership shares which we now adopt on the basis of actual use of the international earth stations are set out below under the "use" column:

Station	*Carrier*	*Existing Ownership Share (%)*	*Reallocated Ownership Share (%) based on current usage*[78]
Contiguous U.S.	Comsat	50.0	50.0
	RCA	10.5	1.4
	WUI	4.0	1.1
	AT&T	35.5	47.5
Hawaii	Comsat	50.0	50.0
	RCA	11.0	4.85
	WUI	3.0	1.9
	ITT	6.0	4.35
	Hawaiian	30.0	38.9
Guam	Comsat	50.0	50.0
	RCA	42.0	48.9
	WUI	8.0	1.1

Because there is no disagreement among the joint owners as to their respective current usage of each of the ESOC facilities, we will require that all operating licenses held by Comsat on behalf of all ESOC members, or by all ESOC members jointly, for each of the respective international earth stations be amended to reflect the above-stated new ownership interests.

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[78] Traffic shares are the number of circuits projected to be in use divided by 2, to reflect usage in terms of ownership shares. We note that in authorizing the construction by ESOC of a third east coast earthavtation we required the ESOC members to enter into ownership avtotiations with all eligible international service carriers. In this case, TRT Telecommunications Corporation (TRT) had indicated a desire to acquire an ownership interest in ESOC that was reasonably related to its use of the international earth station facilities. *Comsat,* 90 FCC 2d 68 (1982), at 86. TRT ultimately decided not to become an ESOC member.

Usage ratios are as of June 30, 1984. *See* letter from Allen E. Flower, ESOC Financial Representative, Comsat, to Robert E. Conn, MCII, dated August 30, 1984. The figures are from the ESOC Financial Statements, August, 1984.

43. *Unbundling:* The unbundling by Comsat of space segment and earth station charges is a necessary and logical requirement to make competition feasible in the provision of earth station facilities. Because the WSD continues to be the sole provider of INTELSAT space segment, Comsat would have both the incentive and ability to favor use of its own earth stations if bundled rates were permitted.[79] Comsat could accomplish this by lowering costs which it allocates to space segment for its own offerings and bundling space segment and its own earth station services into one rate element. If this were done, we would have great difficulty in assessing whether these changes were reasonable and whether lengthy investigations could be required. We shall therefore require that Comsat unbundle the earth station and space segment components of the rate elements for all of its offerings presently contained in Tariff No. 6, 14 and 101 and refile separate cost-based rates.[80] On a related matter, we reject AT&T's proposal that we require Comsat to request at this time the availability of full and partial transponder capacity from INTELSAT based on equivalent voice channels requirement and to offer such capacity in its unbundled space segment tariff.[81] We agree with Comsat and ITT that this issue is beyond the scope contemplated by the NPRM and that there is an insufficient record on which to base such a decision.

44. In response to our request in the NPRM, Comsat submitted sample tariffs and an explanation of the methodology employed to derive such rates. Most respondents found the submission unacceptable and called upon the Commission to both investigate or arrange an independent audit of space segment costs and direct Comsat to file fully supported tariff proposals. The parties argued that Comsat failed to clearly identify and describe the costs of all activities and failed to verify that: (a) its total costs for its INTELSAT services are accurate and reasonable and do not

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[79] In most instances, Comsat presently operates as a carrier's carrier in that it is the sole provider of earth station and space segment service utilized by other international carriers in the provision of their end-to-end services. As to television offerings, Comsat can furnish its service directly to end-users.

[80] Comsat provides its services under five separate tariffs: Tariff No. 6 - voice grade service for NASA between Comsat earth stations and ship mobile terminals; Tariff No. 14 - high speed digital service for Advanced Research Project Agency between the Etam earth station and overseas locations; Tariff No. 16 - television service between customer-provided earth stations in the U.S. and Mexico; Tariff No. 101 - a general offering of voice grade, television, audio, high speed data, digital data, point-to-alternate point, and international business satellite services; and Tariff No. 102 - maritime services. The rates in Tariff Nos. 6, 14 and 101 contain bundled rate elements for each service based on the costs of the INTELSAT space segment and earth stations. Tariff No. 102 includes maritime services which contain bundled rate elements for each service based on the costs of the INMARSAT space segment and earth stations. Tariff No. 16 covers only space segment costs.

[81] AT&T comments at page 16.

reflect cross-subsidization; (b) its allocation of costs between space and ground segments is accurate and reasonable; and (c) its rates are fairly derived from valid demand projections, are just and reasonable for each of its different services and reasonably reflect "used and useful" endeavors justifiably chargeable to Comsat's monopoly ratepayers.[82] The purpose of receiving a sample tariff from Comsat was to permit interested parties and the Commission staff the opportunity to preview an unbundled tariff and to give Comsat a preliminary opportunity to receive feedback on such a filing. The attention paid to the sample filing indicates that it served this purpose well. However, as merely a sample tariff, it cannot be the subject of any conclusions here. When filing its tariff, we would expect Comsat to take into account the suggestions and concerns raised by the parties in their comments.

45. *Moratorium:* Comsat argued in its "wholesale/retail" combination earth station proposal that the Commission should adopt a three-year moratorium on applications for the construction of multi-purpose earth stations in order to allow the marketplace to adjust to the new ownership policy.[83] Under a deluge of responses unanimously attacking the moratorium as unwarranted and anticompetitive, Comsat restated its position as favoring a modest transition period only, that under a case-by-case analysis of multi-purpose stations, the Commission could begin processing those applications at the termination of this proceeding. We conclude that a lengthy moratorium period is unwarranted and not in the public interest. We do not believe a formal transition period for multi-purpose earth station applications is necessary as there is a built-in delay period in the application process as well as in the INTELSAT coordination and earth station construction processes. Moreover, we do not expect to receive many applications for multi-purpose earth stations while the ESOC disposition negotiations are in progress. In addition, all parties to this proceeding have been on notice since the issuance of the NOI and NPRM that we were seriously contemplating the immediate acceptance and processing of multi-purpose earth station applications upon the release of this order. It cannot be said, therefore, that any party is unfairly surprised. We shall thus begin processing such applications.[84]

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[82] *See* Reply Comments of ITT, pp. 3-12, RCA, Hinchman, and AT&T.

[83] Under this proposal, the first part of this period would involve negotiations necessary for the dissolution of ESOC and the establishment of the combination earth stations operations. The second part would be a baseline period during which Comsat would develop and offer a range of services to carriers only. Comsat proposed that the Commission completely forebear from accepting applications for multi-purpose and television earth stations at this time.

[84] As we have noted earlier, IBS earth station applications have already been granted conditioned on this Report and Order. *See* fn. 19, *supra.*

46. *INTELSAT Representation:* With regard to the issue of INTELSAT representation, most respondents agreed that Comsat should continue to represent U.S. interests in INTELSAT but that we should adopt mechanisms for greater public participation in the formulation of U.S. positions in INTELSAT. This issue concerns U.S. input into INTELSAT policy, tariff and procurement decisions as distinct from the issues of earth station integration or technical coordination of U.S. earth stations with the INTELSAT system. Pursuant to the INTELSAT Agreements, Comsat is currently the U.S. Signatory to INTELSAT and represents the United States at INTELSAT meetings. Comsat's actions within INTELSAT are subject to our instructional process by which NTIA, the Department of State and the Commission develop U.S. positions on various issues. Under a competitive policy, different earth stations would be owned by different entities; these earth stations, however, would continue to be considered by INTELSAT as U.S. operated earth stations. Most parties proposed various mechanisms by which to increase carrier, operator and public participation in INTELSAT meetings and to guarantee greater carrier and public input into the instructional process. Concern was also expressed that investing carriers and interested parties should have timely access to INTELSAT documents in order to formulate and present meaningful comment to the Commission in its instructional function.

47. Comsat, the U.S. Signatory to INTELSAT under the INTELSAT Agreement, is the only U.S. entity responsible for investing in space segment. We believe that Comsat, through the instructional process, will continue to adequately represent U.S. interests. Notwithstanding this conclusion, we believe that greater carrier input on certain issues into the instructional process would be highly beneficial. The governement agencies responsible for monitoring Comsat's representational role at INTELSAT meetings and issuing instructions to the Signatory (NTIA, the Department of State and the Commission) have instituted an informational procedure by which to provide the public with an opportunity to comment on issues to be addressed in INTELSAT meetings in order to broaden the base of information prior to the issuance of government instructions to Comsat. Consistent with the Commission's directives and criteria concerning the public dissemination of INTELSAT-related documents and information established in the *Comsat Structure* proceeding,[85]

[85] *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, 90 FCC 2d 1159 (1982) (*First Structure Order*), *recon. denied*, 93 FCC 2d 701 (1983), *Comsat*, 97 FCC 2d 145 (released April 20, 1984) (*Second Structure Order*). *See also* letter dated March 30, 1984, from the Chief, Common Carrier Bureau, to Lawrence M. DeVore, Vice President and General Counsel, World Systems Division, Comsat, regarding Comsat's implementation of the Commission's directives in its *Comsat Structure* order on the public availability of information, technical data and

the Commission now makes most INTELSAT documents received by Comsat available for public inspection and comment. The comments are reviewed and considered to the extent that time allows and may, if deemed appropriate, be incorporated into specific instructions. If this procedure proves workable, it will be continued for future INTELSAT meetings. If not, we will employ whatever means may be necessary to find a workable procedure. Further, any owner/operator of an international earth station will be able to attend the annual meetings of Operational Representatives that address operating and coordinating matters that relate to the space segment and earth stations as integral parts of the global communications satellite system.[86] These meetings have traditionally been open to all earth station owners, whether they are Signatories or not. Comsat shall work with owners/operators of international earth stations to arrange for their participation in OR meetings.

48. We take special note that Comsat has taken a number of steps to increase the public availability of information regarding INTELSAT and its activities as well as Comsat's actions as U.S. Signatory. At the first of an ongoing series of public meetings, held on August 2, 1984, Comsat presented a detailed overview of INTELSAT's structure and activities including its procurement process, the mechanics of its meetings, Comsat's document distribution program, and the government instructional process.[87] Comsat also presented a review of issues currently before the INTELSAT Board of Governors.[88] Comsat also stated its intention to make available the agendas and documents for INTELSAT meetings in advance of those meetings in order to enable carriers and others to review and comment on the material before the meetings. Comsat's second public meeting on October 10, 1984, was designed to acquaint individuals with the INTELSAT operational planning process and with Comsat's role in this process. The meeting included a review of procedures instituted in the United States by Comsat to insure that all U.S. operational requirements are identified, planned for, and satisfied in a timely and coordinated fashion, and the continuity and quality of U.S. services using INTELSAT is maintained. Comsat also conducted two public working group meetings on October 11, 1984, one of which was

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patented inventions generated by or on behalf of the INTELSAT and INMARSAT organizations.

[86] *See* Operations Representatives Organization and Coordination Procedures, BG-29-62E, October 3, 1977.

[87] While Comsat has indicated in its letter to Chairman Fowler, August 9, 1984, that similar overview briefings will not be necessary on a regular basis, it has offered to hold them for any interested individuals or groups.

[88] Comsat stated its intention to hold such forums for review and discussion on a quarterly basis, in synchrony with the schedule of Board of Governors' meetings, and to place taped records of these review meetings in the public document room.

designed for U.S. International Service Carriers and U.S. international earth station operators on the preparation for the October 24, 1984 INTELSAT Operations Representatives' Conference. The other working group meeting was designed for operators and potential operators of U.S. Digital Express (IBS) earth stations to review and discuss planning, implementation, operation, and coordination matters affecting earth stations for INTELSAT IBS services. Finally, Comsat has established an office of the World Systems Division Vice-President, International Operations, to handle in a timely and equitable manner, public inquiries related to INTELSAT issues.[89]

49. *Application Criteria:* We conclude with respect to application criteria that all relevant public interest factors shall continue to be considered under Parts 25 and 63 of the Commission's Rules in deciding whether to authorize the construction and operation of new earth stations and determining the future operation of existing stations.[90] We are aware, however, that the pertinent factors can differ with respect to different classes of earth stations. As to applications for IBS stations, the issues of system efficiency and revenue diversion are not critical for our consideration. IBS is a flexible, totally digital integrated service designed to accommodate a full range of user applications including private facsimile, data and teleconferencing. INTELSAT has planned the space segment capacity for IBS, unlike its standard capacity, to enable a single transponder to accommodate access by a large number of earth stations. The IBS capacity is further designed to accommodate user networks through a variety of connectivity arrangements. Since the multiple access concept is an integral part of the IBS concept, we need not consider the efficiency effect of multiple IBS earth stations on established INTELSAT services.[91] As to applications for television earth stations, we again do not consider the issues of inefficiency or revenue diversion to be critical for

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[89] Comsat has proposed that it will continue to provide carriers with the plans which INTELSAT proposes for consideration by the meetings of Operations Representatives, and continue to hold briefings before and after these meetings to discuss both the proposed and agreed upon plans with the carriers. We have concluded that any independent earth station owner may attend such meetings. However, the participants in the OR meetings may, at their discretion, continue to hold briefings among themselves before and after the OR meetings to discuss any of the technical issues arising from the meetings.

[90] *See* para. 37, *supra.* for our discussion on the determination of the public interest in the 214 application process.

[91] We reject Comsat's proposal for a structured framework to be instituted by which the Commission could restrict the number of IBS stations in a particular market or geographic area that could otherwise inhibit efficient use of IBS capacity to serve all areas of the United States. We believe that U.S. use of IBS capacity should be determined by the actual need for IBS service as demonstrated by applications that we may receive and not by some predetermined plan.

review. Like IBS, television service is a specialized offering distinct from INTELSAT's general offering of space segment capacity. This service is a minor source of revenues for INTELSAT (4 percent) and is provided by a small number of specific satellite transponders which can be accessed by only a limited number (ordinarily two) earth stations per transponder at a given time. Since no greater number of earth stations would access technically a particular transponder even under a more liberal ownership policy, and since revenue diversion would be an insubstantial part of Comsat's current revenues, we shall not consider these factors in our application authorization analysis. We shall therefore process the applications for both IBS and television service stations on a routine basis with consideration limited to legal (citizenship and character), financial (ability to meet the costs of construction and operation), and technical (station location, desired frequencies and types of equipment to be used, hours and mode of operation, etc.) qualifications of the applicant as required by Sections 308 and 319 of the Communications Act. Absent special problems, the Commission shall treat these applications as routine and will seek to expeditiously process them. Upon grant, the applicant shall be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While we shall limit the use of the facilities authorized for the provision of IBS or television services to these services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

50. We shall continue to closely scrutinize applications for multipurpose earth stations as they raise more complex economic, technical and operational issues and may affect the variety, quality and price of services offered to users. In determining whether the public interest would be served by a grant of a particular application, we shall analyze the impact of a grant on the provision of earth station and space segment services. We shall proceed with this analysis of how a proposed facility would affect service to the public by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present. Because we have adopted a case-by-case approach, a moratorium or permanent bar on the ability of AT&T or any other entity to own and operate its own international earth stations is unwarranted.

51. With regard to applications for all classes of earth stations, we shall monitor frequency coordination and engage in procedures to implement the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347, as may be necessary. Applicants shall file FCC Forms 401

(Application for New or Modified Common Carrier Radio Station Construction Permit) and 430 (Common Carrier and Satellite Licensee Qualification Report) in addition to a Section 214 application under Section 63.01 of the Commission's Rules. Upon acceptance for filing, the applications shall be placed on 30 days public notice pursuant to Section 309 of the Act and Section 63.52 of the Rules. Further, Section 201(c)(2) of the Communications Satellite Act requires authorized carriers to have nondiscriminatory use of and equitable access to the communications satellite system and satellite earth stations owned by other carriers.

52. *Structure:* As to the appropriate organizational form for Comsat's participation in the competitive ownership and operation of earth stations, we conclude that all of Comsat's earth station activities must be provided through a common carrier entity separate from the parent World Systems Division. We reject Comsat's argument that earth station ownership must be within the World Systems Division rather than within a competitive subsidiary in that as a matter of law, the parent is the "corporation" as referenced in Section 201(c)(7) of the Communications Satellite Act.[92] We believe that the term "corporation" includes the subsidiaries of Comsat. This view is consistent with our determination in the *Comsat Study,* the *First Comsat Structure* order and the *Second Comsat Structure* order that most activities other than the provision of INTELSAT space segment capacity should be performed outside of the World Systems Division.[93] We reject Comsat's arguments that: (a) there would be overriding cost problems resulting from this structural separation; (b) traditional regulatory oversight would obviate the need for separation; (c) structural separation would sacrifice efficiency resulting from Comsat's management of both earth stations and space segment services; and (d) if *Authorized User II* policy is reinstated, Comsat would have to form two separate subsidiaries, one for the provision of end-to-end services and the other for basic transmission service.[94]

53. As we emphasized in our *Comsat Structure* decisions, the structural separation of Comsat's jurisdictional activities from its nonjurisdictional activities will minimize cross-subsidization between competi-

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[92] Section 201(c)(7) of the Communications Satellite Act directs the Commission to grant appropriate authorization for the construction and operation of earth stations to the corporation (Comsat), to authorized carrier(s), or to both jointly.

[93] *See Comsat Study,* 77 FCC 2d 564 (1980) *Comsat,* 90 FCC 2d 1159 (1982) (*First Structure Order*) and *Comsat,* 97 FCC 2d 145 (released April 20, 1984). (*Second Structure Order*).

[94] While recognizing that in some instances competitive activities should be carried out in a separate subsidiary so that the corporation's competitive ventures do not profit at the expense of ratepayers, Comsat claimed that a separate subsidiary requirement is expensive, necessitating a duplication of functions and impeding the overall efficiency of the organization.

tive and monopoly services. It will also insulate Comsat's monopoly rate base, provide for separate accounting treatment for the monopoly services, assure arms-length dealings between the competitive subsidiary and the WSD, and help prevent improper transfers of information. Comsat has not filed with us data that would refute our findings of the need for a separate common carrier subsidiary. We also reject the transitional proposal raised by AT&T and RCA which would permit Comsat to retain its interest in multi-purpose earth stations in the WSD until ESOC's future is determined. This approach would be reasonable if ESOC were to be dissolved shortly. However, that is not necessarily the case: the owners may decide to continue ESOC. Thus, we find moving all of Comsat's earth station investment from the WSD to a separate subsidiary to be the prudent solution.[95]

54. We therefore conclude that all Comsat applications for new stations or for modifications to authorized stations be made through a Comsat common carrier subsidiary. Comsat shall also transfer any ownership interests in authorized INTELSAT stations from its World Systems Division, which provides monopoly space services, to a separate common carrier subsidiary, which will provide competitive earth segment services. Applications shall include a description of all functions to be transferred to the subsidiary as well as a description of all functions to be retained by the World Systems Division. An application for such a transfer shall be submitted to the Commission for review prior to implementation.

III. Summary of Conclusions

55. *Flexibility in Authorization for New Earth Stations.* We conclude that the adoption of a more liberal earth station ownership policy which depends upon marketplace forces is consistent with the Communications Act of 1934 and the Communications Satellite Act of 1962. We find that carrier owned and operated earth stations are technically feasible, create no major economic hurdles, will not greatly affect our foreign partners in INTELSAT, and will result in lower cost and technically superior service to consumers. We also find that a smooth transition to this environment can be achieved without jeopardizing service to users or carrier investments. We thus permit any international carrier or group of carriers to apply for authority to construct and operate such stations,

[95] We find here only that implementation of our *Earth Station Ownership* policy requires that Comsat place its investment in earth stations into a separate subsidiary. In *Authorized User II,* we are considering whether Comsat should also be allowed to offer end-to-end (retail) telecommunications services and, if so, whether it should be required to offer such services through a separate subsidiary. We have not yet resolved either question. We shall therefore include Comsat's arguments on the disadvantages of multiple subsidiaries in our *Authorized User II* policy.

whether IBS, television, or multi-purpose types. To facilitate this policy, Comsat shall be required to file unbundled, cost-based tariffs for INTELSAT space segment and earth segment usage. Consistent with our *Comsat Structure* orders, Comsat shall file space segment tariffs through its World Systems Division and earth station tariffs through a subsidiary acting as a common carrier. Finally, we conclude that a moratorium on accepting applications is not in the public interest.

56. *Authorization Criteria for New Earth Stations.* We conclude that relevant technical, economic and operational considerations shall be addressed in our determination of whether to authorize a particular multi-purpose application. Pursuant to the *RCA, Mackay, Telocator,* and *Hawaiian* line of cases, we shall evaluate on a case-by-case basis whether, among other things, a particular proposal will serve the public interest. We shall balance the benfits of reduced distance to users, access to new satellites, lower charges to users, and increased customer base for INTELSAT services against the detriments of reduced technical efficiency and revenue diversion. We shall particularly look at the overall impact on the provision of earth station services and space segment capacity. Applications for IBS and television (video) earth stations shall be processed in a streamlined, routine fashion, with consideration limited to legal (citizenship and character), financial (ability to meet the costs of construction and operation), and technical (station location, desired frequencies and types of equipment to be used, hours and mode of operation, etc.) qualifications of the applicant as required by Sections 308 and 319 of the Communications Act.

57. *Flexibility in Determining the Future of ESOC.* We conclude that equity and the public interest demands that we reallocate ownership shares in ESOC to accord with the joint owners' current usage of ESOC facilities. Subsequent to the release of this order, the joint owners of the existing international earth stations shall have the opportunity to negotiate a resolution of the future of ESOC. Any arrangement unanimously agreed upon by the joint owners shall be subject to Commission review.

IV. Ordering Clauses

58. THIS ORDER IS ISSUED to adopt and promulgate our new policy with regard to the ownership and operation of U.S. international earth stations that operate with the INTELSAT global communications satellite system.

59. IT IS ORDERED that pursuant to our authority under Sections 4(i) and (j) and 205 of the Communications Act of 1934 and Sections 201(c)(7), (9), and (11) of the Communications Satellite Act of 1962, and Section 1.423 of the Commission's Rules this order IS ISSUED.

60. Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), IT IS CERTIFIED, that Sections 603 and 604 of the Act do

not apply because this rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. §§ 603, 604, 605(b). We do not anticipate that a substantial number of carriers will enter the earth station market. Further, we do not believe that very many of these entrants will be small entities.

61. IT IS ORDERED, that the Secretary shall cause a copy of this order to be published in the Federal Register and shall mail a copy of this order to the Chief for Advocacy of the Small Business Administration.

62. IT IS ORDERED, that the ESOC joint owners' ownership shares in ESOC facilities shall be reallocated based on current usage figures. All operating licenses held by Comsat on behalf of all ESOC members, or by all ESOC members jointly, for each of the international earth stations shall BE AMENDED by January 18, 1985 to reflect the new ownership interests set forth below:

Station	*Carrier*	*New (Reallocated) Ownership Shares (%)*
Mainland	Comsat	50.0
	RCA	1.4
	WUI	1.1
	AT&T	47.5
Hawaii	Comsat	50.0
	RCA	4.85
	WUI	1.9
	ITT	4.35
	Hawaiian	38.9
Guam	Comsat	50.0
	RCA	48.9
	WUI	1.1

63. IT IS ORDERED, that to effectuate the separation by Comsat of its earth station activities from its space segment activities, Comsat shall transfer from the parent World Systems Division to a subsidiary all ownership interests in authorized international earth stations operating with the INTELSAT global satellite system.

64. IT IS ORDERED, that on or before January 18, 1985, the Comsat subsidiary referred to in paragraph 63 shall file an application under Section 214 of the Communications Act for certification as a common carrier to provide earth station services via the INTELSAT global satellite system.[96]

65. IT IS ORDERED, that on or before January 18, 1985, the Comsat World Systems Division shall file an application: (a) to modify its authorizations under Section 214 of the Act to provide for the transfer of earth station activities to the separate common carrier subsidiary referred

[96] We note that these filing procedures may necessitate our granting Comsat special temporary authority, pending final action on the required applications.

to in paragraph 63; and (b) to transfer to the separate subsidiary all Title III radio licenses issued to the World Systems Division on its own behalf or on behalf of the Earth Station Ownership Committee for the operation of satellite earth stations in connection with services of the INTELSAT global satellite system.

66. IT IS ORDERED, that Comsat shall file, in accordance with our rules, cost-based tariffs for INTELSAT space segment through the parent World Systems Division and file earth station tariffs through a separate subsidiary acting as a common carrier on February 1, 1985, to become effective on 45 days notice after filing of tariffs.

67. IT IS ORDERED, that Comsat shall file through a separate common carrier subsidiary all applications for new international earth stations or for modifications to authorized international earth stations.

68. IT IS ORDERED, that the request of Equatorial Communications Systems for Commission revision, in this proceeding, of Part 25 of our Rules to permit U.S.-based receive-only satellite earth stations to receive signals from any INTELSAT satellite without being licensed IS DENIED.

69. IT IS ORDERED, that the motion of RCA Global Communications, Inc. for leave to file late reply comments to a Public Notice released in File No. I-S-P-84-006 (RCA Request for Immediate Interim Relief) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier
International Satellite Systems

Notice of Inquiry and Proposed Rulemaking adopted regarding establishment of satellite systems which would provide international communications services.
—International Satellite Systems
CC Docket No. 84-1299

FCC 84-632

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Establishment of Satellite Systems Providing International Communications	CC Docket No. 84-1299

NOTICE OF INQUIRY AND PROPOSED RULEMAKING

Adopted: December 19, 1984; Released: January 4, 1985

BY THE COMMISSION:

1. Notice is hereby given pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403 (1984), Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1984), and Sections 1.412 and 1.430 of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.412, 1.430 (1984), of the initiation of an inquiry and proposed rulemaking regarding the construction and operation of satellite systems providing international services. The purpose of this notice is to solicit data and analyses regarding issues that have arisen in connection with the filing of a series of applications for authority to establish communications satellites that would provide international services, and to obtain comments on the recent executive branch decision that such systems are "required in the national interest" subject to certain limitations.

2. These applications are those filed by the Orion Satellite Corporation ("Orion"), File No. CSS-83-002-P, on March 11, 1983; by International Satellite, Inc. ("ISI"), File Nos. CSS-83-004-P (LA), I-P-C-83-073, on August 12, 1983; by RCA American Communications, Inc. ("RCA"), File No. I-T-C-84-085, on February 13, 1984; by Cygnus Satellite Corporation ("Cygnus"), File No. CSS-84-002-P (LA), on March 7, 1984; and by Pan

American Satellite Corporation ("PanAmSat"), File No. CSS-84-004-P (LA), on May 31, 1984.[1]

3. Communications Satellite Corporation ("Comsat") has filed petitions to deny each of the applications listed above. Several other parties have filed comments.

4. On April 6, 1983, the Department of State and the Department of Commerce sent a joint letter regarding the Orion application to the Commission requesting that the Commission refrain from taking any final action on the application until such time as an executive branch group could review and study the application's impact on the national interest and foreign policy of the United States.[2] On August 26, 1983, following the filing of ISI's application, the Department of Commerce sent a letter to the Commission which again requested that the Commission not take any final action on the applications.[3] The letter stated that the filing of a second application for international satellite services raised new considerations which would have to be included in the executive branch analysis.

5. On November 28, 1984, President Reagan signed a presidential determination that alternative satellite systems were "required in the national interest" within the meaning of §§ 102(d) and 201(a) of the Communications Satellite Act. The President's determination states that the United States shall consult with Intelsat regarding such systems "as are authorized by the Federal Communications Commission." The determination is included as Attachment A to this Notice. At the direction of the President, the Department of State and Department of Commerce jointly informed the Commission, by letter, of the President's decision and the criteria necessary to ensure that the United States meets its

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[1] Systematics General Corporation ("Systematics") filed two applications to construct, launch, and operate satellite systems providing international services (File Nos. CSS-84-005-P(LA), CSS-84-006-P(LA)) on June 12, 1984. Systematics filed a motion to withdraw both applications on July 27, 1984. Under delegated authority, the Commission dismissed the applications without prejudice by letter dated August 6, 1984 pursuant to § 1.748(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.748 (a)(1984).

In addition, Western Union Telegraph Co. requested, and was granted, a waiver to spend additional money to modify its previously authorized WESTAR VI-S domestic satellite (File No. 1144-DSS-P/LA-84) to allow 6 transponders to provide coverage of Central and South America. Letter from Chief, Domestic Facilities Division, Common Carrier Bureau, to Robert N. Green, Associate Counsel, Western Union Telegraph Company (July 20, 1984).

[2] Letter from David J. Markey, Assistant Secretary - Designate for Communications and Information, and Diana Lady Dougan, Coordinator, International Communications and Information Policy, to the Chairman of the Federal Communications Commission (April 6, 1983).

[3] Letter from David J. Markey, Assistant Secretary - Designate for Communications and Information, to the Chairman of the Federal Communications Commission (August 26, 1983).

international obligations and to further U.S. telecommunications and foreign policy interests.[4] A copy of the State/Commerce letter appears as Attachment B to this Notice. The letter proposes that two restrictions be imposed on the alternative systems prior to final authorization by the Commission:

(1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service); and,

(2) one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party under Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm.

6. The executive branch has indicated that an executive branch report detailing the grounds for its action may be submitted as a part of this proceeding. Interested parties will have an opportunity to reply to any such submission.

I. Background

7. Orion's proposed system would consist of two in-orbit satellites and one ground spare, with each satellite having 22 transponders providing 36 MHz of useable bandwidth per transponder. The satellites' signals would cover the eastern portion of North America and the western portion of Europe and would transmit and receive in the 11/14 GHz frequency bands. The proposed satellites would be designed to provide video, data, and audio services using digital and analog modulation techniques. The video services would consist of both full-frame, full-speed video for television programming, and compressed, teleconferencing capabilities. Each satellite's capacity would exceed the equivalent of 20,000 voice-grade half-circuits, 22 full rate video signals, or 1.4 Gbps of data signals. Orion states in its application that it would not operate as a common carrier because it would sell or lease, over the life of the satellite, transponder capacity on a non-tariffed basis to users on either side of the Atlantic.

8. ISI's proposed system would consist of two in-orbit satellites and one ground spare, with each satellite having 32 receive and transmit channels (over 32 transponders) providing 54 MHz of useable bandwidth per channel. The satellites' signals would cover the contiguous 48 United States (CONUS) and the western portion of Europe as far as the Adriatic Sea. The proposed system would transmit and receive in the 11-12/14 GHz frequency bands. The satellites would be designed to provide video, audio,

[4] Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission (November 28, 1984).

and data services using both digital and analog modulation techniques. The video services would consist of both high-speed and slow-scan video teleconferencing and, along with the audio services, would encompass every kind of television and radio programming currently available in the United States and Europe. The data services would include TWX/telex, new swires, facsimile, and electronic mail. ISI states in its application that it would use a portion of its capacity to provide services on a tariffed common carrier basis. ISI would sell or lease the remainder of its capacity in the same manner as that proposed by Orion.

9. Cygnus' proposed system would consist of two in-orbit satellites and one ground spare, with each satellite having 16 transponders providing 54 MHz of useable bandwidth per transponder. The satellites' signals would cover CONUS and the western portion of Europe. The system also would have a spot beam which would provide service to Puerto Rico, the U.S. Virgin Islands, the Caribbean Basin, and portions of Central America. The system would operate in the 11-12/14 GHz frequency bands and be able to operate with a variety of earth stations including the inexpensive "micro" earth stations (e.g., roof-top antennas) as well as the larger "mini" and "main" earth stations.[5] The satellites would be designed to provide digital communications services including video teleconferencing, high-speed facsimile, computer-to-computer communications, remote printing, teletext, videotext, and data collection and distribution services. Cygnus states in its application that it would offer all of its transmission capacity on a non-common carrier basis through long-term leases or transponder sales.

10. PanAmSat's proposed system would consist of one in-orbit satellite and one ground spare. Twelve of the satellite's 36 transponders would be used for international traffic between North and South America. The remaining 24 would be used for domestic service in South America. The twelve international transponders would have 72 MHz of useable bandwidth per transponder and would be used to provide links between New York, Miami, the South American continent, and parts of Central America, the Caribbean, and the Iberian peninsula. The system would uplink at 6.4-6.9 GHz and downlink at 10.7-11.2 GHz. The satellite would be designed to provide video and audio distribution services, specifically, distribution of television and radio programs from entities such as television networks, motion picture studios, cable systems, and news and wire services. PanAmSat proposes in its application to offer its transponder capacity on a non-common carrier basis for sale or long-term lease to both U.S. and foreign customers.

[5] Mini earth stations generally have antennas ranging in size from 2 to 4.5 meters. Main earth stations have antennas that are larger than 4.5 meters. *See* Cygnus Satellite Corporation application, File No. CSS-84-002-P(LA), at 8.

11. RCA's proposed system would consist of six transponders on its previously-authorized SATCOM VI domestic satellite.[6] The satellite would operate in the 4/6 GHz frequency band and have 36 MHz of useable bandwidth per transponder capable of covering CONUS and portions of Europe and Africa. The six transponders would be available for either domestic or international service because the satellite would be equipped with transfer components capable of switching the transponders' service areas to accommodate either service. The transponders would be used for video distribution, teleconferencing, private leased voice, and low-speed and medium-speed data communications. RCA states in its application that it would provide its services on a tariffed, common carrier basis, but it also states that it would make whole transponders available for customers with high capacity needs.

12. These applications are the first to be filed with the Commission that propose to construct, launch, and operate satellite systems capable of international service, other than those filed by Comsat as the U.S. Signatory to the International Telecommunications Satellite Organization ("Intelsat"). The applications, and the comments and petitions that have been filed in response to them, raise a variety of legal, foreign policy, economic, trade, and technical issues which the Commission previously has had no occasion to address. The overarching issue presented by the applications is whether the public interest will be served by granting them. To resolve this issue, the Commission must consider a question of fundamental U.S. policy, namely, the extent to which United States telecommunications users should be required to use Intelsat exclusively to meet their future international communication satellite needs. Our concern in disposing of the applications will be to develop a policy which will assure that U.S. needs are met in the future.

13. The Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744 (1984), is one of the primary expressions of United States' policy on international commercial satellite systems. The Act's stated purposes are: (1) to promote the establishment of a commercial communications satellite system in order to serve the needs of all countries and to improve the global communications network; and (2) to contribute to world peace and understanding by establishing a system, through the cooperation of all countries, that benefits the economically less developed countries as well as the economically developed countries. 47 U.S.C. § 701(a) and (b). The Act provides that the United States will participate in the organization and operation of such a satellite system through a private corporation formed under the Satellite Act and subject to government oversight. 47 U.S.C. § 701(c). In addition, the Act states that additional satellite systems are not

[6] RCA American Communications, Inc., Mimeo No. 33200, released August 4, 1983.

precluded, if the systems are necessary to meet unique governmental needs or are otherwise required in the national interest. 47 U.S.C. § 701(d).

14. The global communications satellite system envisioned by the Satellite Act is owned and operated by Intelsat, an independent self-supporting organization comprised of 109 member countries. The United States' signatory to Intelsat is Comsat, a private corporation created pursuant to the Satellite Act. The definitive arrangements which formally establish Intelsat consist of two separate international agreements which set out the duties and obligations of the participating governments and of the actual investors and participants in Intelsat. These arrangements became effective in 1973, although Intelsat has been operational since 1964. Since its birth in 1964, Intelsat has grown rapidly, reporting $315 million in total revenues for 1982 and projecting $391 million in total revenues for 1983.[7]

15. The Intelsat global satellite system is composed of a space segment and a ground segment. The space segment consists of communications satellites and related equipment necessary to operate these satellites, all of which is owned by Intelsat. The ground segment consists of various earth stations, located throughout the globe, which transmit and receive signals from Intelsat satellites. The earth stations generally are owned and operated by the telecommunications entities of the countries in which they are located. The Intelsat global system, as of July, 1984, consists of 15 satellites in geostationary orbit.[8] The system had 410 earth stations in 1982, and Intelsat projected that 652 earth stations would be operating in the system by the end of 1983.[9]

16. The purpose of this proceeding is to obtain data and analyses regarding the possible effects of establishing alternative international communications satellite systems. Through this Notice, we seek information that will assist us in resolving a number of issues raised by the applications. In the following discussion, we will outline the issues upon which we are requesting comment. We expect the analyses, recommendations, and positions of commenting parties to be supported by specific information and data. Unsupported assumptions and conclusory statements will receive such weight as they merit.

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[7] Intelsat, 1983 Annual Report 28 (1983).

[8] Intelsat Document, "Intelsat Satellites in Orbit: Technical Status for the month of July 1984," Addendum No. I to BG-60-8E (August 15, 1984) (available in Public Reference Room (533), Federal Communications Commission).

[9] Intelsat, 1983 Annual Report 15 (1983).

II. Legal Issues

A. Consistency with Communications Satellite Act of 1962

17. The Commission has previously found that § 102(d) of the Communications Satellite Act of 1962 contemplates the establishment of international satellite systems, in addition to the Intelsat global system, when necessary to meet U.S. needs or to respond to changing satellite technology.[10] Section 102(d) provides as follows:

> It is not the intent of Congress by this chapter to preclude the use of the communications satellite system for domestic communication services where consistent with the provision of this chapter *nor to preclude the creation of additional communications satellite systems*, if required to meet unique governmental needs or *if otherwise required in the national interest.*

47 U.S.C. § 701(d) (emphasis added). In addition, in language almost identical to that of Section 102(d), Congress provided in § 201(a)(6) of the Act that the President shall "take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications satellite system is required to meet unique governmental needs, or *is otherwise required in the national interest.*" 47 U.S.C. § 721(a)(6) (emphasis added).

18. The applications before us, therefore, raise issues regarding the factors we should consider in determining when the "national interest" standard of these statutory sections has been met. In opposing the applications, Comsat has argued that the clause "required in the national interest" creates a high threshold standard which must be satisfied before the applications can be granted. Comsat maintains that the Commission's *Transborder Decisions* [11] and the views of the executive branch on the transborder applications[12] set forth the showing required of the applicants to satisfy the national interest standard. Comsat argues that the applications fail to make that showing. In contrast, the applicants

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[10] Transborder Satellite Video Services, 88 FCC 2d 258, 273 (1981).

[11] Transborder Satellite Video Services, 88 FCC 2d 258 (1981) (*Transborder I*). *See also* Satellite Business Systems, 88 FCC 2d 195 (1981), and American Satellite Company, 88 FCC 2d 128 (1982), Eastern Microwave, Inc., File Nos. I-P-C-81-049, *et al.*, Mimeo No. 2617, released March 1, 1983 (*Transborder II*); American Telephone and Telegraph Company, File Nos. I-P-C-82-048, *et al.*, Mimeo No. 6119, released August 26, 1983 (*Transborder III*); Bonneville Satellite Corp., *et al.*, File Nos. I-T-C-83-148, *et al.*, Mimeo No. 1554, released December 29, 1983 (*Transborder IV*); Western Union Telegraph Company, *et al.*, File Nos. I-T-C-83-068, *et al.*, Mimeo No. 3286, released April 4, 1984 (*Transborder V*); Eastern Microwave, Inc. *et al.*, File Nos. I-T-C-84-095, *et al.*, Mimeo No. 6425, released September 11, 1984 (*Transborder VI*).

[12] Letter from the James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, to Mark S. Fowler, Chairman, Federal Communications Commission (July 23, 1981), *reprinted in* Transborder Satellite Video Services, 88 FCC 2d 258, 287 (1981).

generally maintain that the national interest standard is satisfied by the variety of benefits that they believe will result from authorization of alternative satellite systems, e.g., lower rates, new services, new markets for U.S. services and products, and a better U.S. defense.

19. As we noted in paragraph 5, *supra,* President Reagan has signed a presidential determination that alternative satellite systems are "required in the national interest" within the meaning of §§ 102 (d) and 201(a) of the Communications Satellite Act. The executive branch's determination reflects its experience with, and responsibility for, foreign policy and international trade issues. The Commission recognizes that it is appropriate to defer to the executive branch on such issues. At the same time, our analysis of the "national interest" under the Communications Satellite Act must also include consideration of telecommunications policy issues. In addition, the Communications Act assigns responsibility to the Commission for determining where the ultimate public interest lies in telecommunications policy. Accordingly, the Commission may be required to consider factors in addition to the Presidential determination in order to assess whether the national interest would be served by authorization of alternative satellite systems. We invite comments on the additional factors, if any, we should consider in determining whether a grant of the applications before us would be in the national interest within the meaning of Section 102(d). We ask that comments consider the purpose and objectives of the Satellite Act in the context of the development of telecommunications technology and the communications satellite industry since enactment. Commenters should identify specifically any marketplace trends or structural features which we should take into account when we interpret the statute. Comments should also address whether the criteria identified in the *Transborder* decisions should apply to the applications before us, and if not, what criteria should be included in our consideration.

20. We also invite comments as to the applicability of *MCI Telecommunications Corp. v. FCC,* 561 F. 2d 1365 (1977), *cert. denied,* 434 U.S. 1040 (1978), to the restriction proposed jointly by the Departments of State and Commerce that the proposed systems only provide services "through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks." Comments should address the interaction of the Communications Satellite Act and the Intelsat Agreement with the usual standards for authorizing facilities and imposing service or other restrictions under Section 214 of the Communications Act. Commenters should consider the need for such a service restriction and the legal standards by which it may be imposed. In addition, if a service restriction is imposed, commentors should address whether there should be a time limit placed on

the restriction and, if so, for what time period should the restriction be imposed. We caution commenters to be aware that some of the applications before us seek only Title III authority while others seek both Title III and Section 214 authority.

B. Obligations Under the Intelsat Agreement

21. The applications also raise issues concerning our obligations under the Intelsat Agreement.[13] Article XIV of the Intelsat Agreement sets out certain rights and obligations of the parties and signatories.[14] Subpart (a) of the article provides that the parties and signatories shall act consistently with, and in furtherance of, the principles in the Preamble and other provisions of the Agreement when exercising their rights and fulfilling their obligations.[15] The Preamble states that the parties to the agreement desire to achieve a single global commercial telecommunications satellite system as part of an improved global telecommunications network in order to provide telecommunications services throughout the world with the most efficient and economic facilities.[16] Article XIV recognizes the possibility that parties to the agreement may establish satellite systems in addition to that operated by Intelsat. Subpart (d) requires parties to coordinate with Intelsat the use of non-Intelsat space segment facilities for international public telecommunications services, stating as follows:

> To the extent that any Party or Signatory or person within the jurisdiction of a Party intends individually or jointly to establish, acquire or utilize space segment facilities separate from the INTELSAT space segment facilities *to meet its international public telecommunications services requirements,* such Party or Signatory, prior to the establishment, acquisition or utilization of such facilities, shall furnish all relevant information to and shall consult with the Assembly of Parties, through the Board of Governors, *to ensure technical compatibility* of such facilities and their operation with the use of the radio frequency spectrum and orbital space by the existing or planned INTELSAT space segment and *to avoid significant economic harm* to the global system of INTELSAT. Upon such consultation, the Assembly of Parties, taking into the account the advice of the Board of Governors, shall express, in the form of recommendations, its findings regarding the considerations set out in this paragraph, and further regarding the assurance that the provision or utilization of such facilities shall not prejudice the establishment of direct telecommunication links through the Intelsat space segment among all the participants.

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[13] An international agreement not directly at issue in this proceeding is the International Telecommunication Union Radio Regulations, a treaty ratified by the United States in September 1983. That treaty establishes procedures and deadlines for the exchange of technical information necessary to coordinate characteristics of satellite networks prior to their implementation, in order to achieve technical compatibility with other networks, and to secure international recognition of frequency assignments to such networks.

[14] Intelsat Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, 3853, TIAS No. 7532.

[15] *Id.*

[16] *Id.* at 3814.

23 U.S.T. at 3854 (emphasis added). On several previous occasions, Intelsat has coordinated favorably, pursuant to this section, separate satellite facilities providing international public telecommunications services. Intelsat found that four alternative satellite systems — the PALAPA-B system serving Indonesian, Malaysia, Philippines, Signapore, and Thailand, the European Communications System (ECS) serving countries in western Europe, the ARABSAT system serving countries in the Near East, and the INTERSPUTNIK system for use between Algeria and several European countries, the U.S.S.R., and Cuba — were technically compatible with, and would not cause significant economic harm to, the global system.[17]

22. One of the applicants before this Commission has argued that Article XIV(d) does not apply to the system it proposes. Orion contends that it would not be providing "international public telecommunications services" within the meaning of Article XIV(d)[18] because it would be selling its transponders or leasing them on a long-term basis to users seeking to establish private systems.[19] Orion maintains that its proposal must be subjected only to the technical coordination mandated by Article XIV(e) of the Intelsat Agreement for "specialized telecommunications services." In its petition to deny Orion's application, Comsat disagrees with Orion's interpretation of Article XIV(d). In addition, the Commission has received from the Department of State a "Memorandum of Law" concluding that Orion would be providing "public international satellite telecommunications services" under Article XIV(d). The memorandum appears as an enclosure to Attachment B to this Notice. We invite comments on the legal analysis and conclusions contained in the memorandum.

23. We request comments as to whether the satellite equipment industry and the satellite services market have experienced changes or developments in technology or industry structure which affect the interpretation and application of Article XIV(d). In particular, commenters may wish to focus on the *Transponder Sales,* decision[20] in which the

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[17] *See* Transborder Satellite Video Services, 88 FCC 2d 258, 275-276 (1981). Intelsat also has authorized the provision of international services via domestic satellite systems finding that such service would not cause significant economic harm. Intelsat Document, "Policies, Criteria and Procedures for the Evaluation of Separate Systems Under Article XIV(d)," BG-60-69E, W/9/84 (August 22, 1984) (available in Public Reference Room (533), Federal Communications Commission).

[18] Orion also relies on the definition for public telecommunications services appearing in Article I(k) of the Intelsat Agreement.

[19] *See generally* Orion Application, FCC File No. CSS-83-002-P, Petition to Deny of Comsat, filed on April 15, 1983, Orion's Response, filed on April 28, 1983, and Comsat's Reply, filed on May 10, 1983.

[20] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.,* World Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

Commission discussed the legal issues and factual circumstances relevant to its decision to permit sales in the domestic market like those contemplated by Orion. Commenters should address whether, and if so, how, the rationale of that decision may apply in conjunction with the Intelsat Agreement to the international market. Commenters should take into account the analysis contained in the Department of State's memorandum on this issue and their own analysis of that memorandum.

24. To the extent that the proposed U.S. systems would provide "international public telecommunication services," and would require coordination under Article XIV(d), the U.S. government, under the terms of Article XIV(d), would be required to consult with Intelsat to avoid, *inter alia,* "significant economic harm" to Intelsat. The criteria for assessing "significant economic harm" are currently the subject of considerable discussion within the international telecommunications community.[21] The Commission invites comments as to the appropriate criteria for determining whether an alternative satellite system would cause economic harm to Intelsat and for measuring the degree of harm. Commenters are further invited to address the degree of harm which constitutes "significant" harm under Article XIV(d). Comments should focus on the language, intent, and drafting history of Article XIV and on technological or structural developments in the satellite industry and services market which may bear on this issue. Previous Intelsat coordinations of transborder applications and of alternative satellite systems will provide some guidance as to how Intelsat and its Signatories and Parties interpret and apply the term "significant economic harm."[22] Commenters should review these precedents and analyze the similarities and differences between the satellite systems which were the subject of past coordinations and the proposed satellite systems presently before the Commission.

25. One approach to defining and quantifying significant economic harm, as proposed in a report done for Intelsat, defines economic harm as the "calculated effect of [alternative satellite] systems on Intelsat's realized cost per unit of utilized space segment capacity"[23] and quantifies significant harm in terms of Intelsat's revenue requirements. There are, however, several problems with this approach. For example, the information and data requirements that will be needed to apply this approach on a prospective basis are formidable. Because many assumptions will be necessary to apply the concept, the reliability of the results may be questionable. We invite comments on the report. Commenters should

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[21] *See, e.g.,* Intelsat Document, *supra,* note 17.

[22] See note 17, *supra,* and text accompanying.

[23] Intelsat Document, "Report on the Study of Significant Economic Harm," BG-60-63E, W/9/84, p. 21 (August 15, 1984).

focus on the definition of economic harm. Commenters also should evaluate the use of revenue requirements as the criteria for estimating economic harm to Intelsat. Commenters also should consider the criteria that are recommended in the Intelsat report for distinguishing significant economic harm from economic harm. The data that are needed to apply the approach that is recommended in the Intelsat report should be discussed with a view toward judging the reliability of the estimates. In addition, commenters should discuss the appropriateness of using a concept of economic harm that does not allow for changes in Intelsat's investment plans, operating procedures, and other steps that it could take to improve its economic efficiency. Drawing on their discussions of economic harm, commenters should propose other alternatives that could be used to assess the impact upon Intelsat, either overall or on a route-by-route basis, of both the entry of alternative systems and the measures Intelsat is able to take to maintain its financial viability.

26. The Commission is aware that there is some overlap between the issues surrounding the interpretation of "significant economic harm" in Article XIV(d) and those addressed by the inquiries set forth below regarding the broader economic impact of alternative satellite systems. We will expect commenters to integrate the economic data, analyses, and positions they may develop in response to the inquiries below with their interpretation of "significant economic harm."

27. We also invite comments regarding the meaning of Articles III and V of the Intelsat Agreement. Intelsat Intergovernmental Agreement, August 20, 1971, 23 U.S.T. 3813, 3819 and 3823, TIAS No. 7532. Some observers maintain that these Articles require Intelsat to charge a uniform price, throughout the globe, for satellite circuits. We invite comments as to whether Intelsat is required by the Agreement to charge globally-averaged rates. Commenters should support their positions with specific references to the Agreement and its drafting history.

III. Economic Considerations

28. In order to assess the economic impact that any authorization of alternative satellite systems might have, we seek comments, information, data, and analyses on a number of economic issues, outlined in detail below. We ask parties submitting comments to concentrate their efforts on the issues we identify. Estimates of quantitative economic impact must be supported fully by the inclusion of the data, assumptions, hypotheses, models, and procedures used to develop them. Such material must be discussed in complete detail. Similar material used to estimate underlying costs, revenues, changes in demand (including demand elasticities), and impact on rates also must be included to support the estimates.

29. As we noted in paragraph 11, above, the fundamental issue presented to the Commission by the alternative satellite applications is

whether the public interest would be served by granting the applications. To resolve this issue, the Commission must identify the advantages of granting these applications and weigh them against any disadvantages. Specifically, the Commission seeks to identify the benefits to the public which would result from granting these applications. Would the applicants offer new and/or innovative services? Would prices be lowered? Are there network efficiencies to be gained? We ask commenters responding to the inquiries below to conclude by addressing how the public interest, as opposed to the interests of the various participants in the marketplace, would be affected by a grant of these applications.

A. Economic Impact on Intelsat

30. Intelsat is presently the principal supplier of international satellite circuits. If alternative satellite systems are authorized, Intelsat would be affected most directly by the entry of these firms into the market. To assist us in identifying the nature and extent of the potential impact on Intelsat, we invite comments on three areas of concern: (1) traffic diversion; (2) revenue impact; and (3) competitive response.

1. Traffic Diversion

31. Alternative satellite systems may compete with Intelsat for the same traffic and attract business away from Intelsat. On the other hand, the systems might serve primarily new users of international satellite services who are not currently, or would never be, Intelsat customers. The Commission seeks information that would help it determine whether, and to what extent, the alternative systems would carry traffic that would otherwise have been carried by Intelsat. In order to make this assessment, the Commission must consider a number of underlying issues which commenters should address.

32. First, the services offered by alternative systems may or may n ot be the same as those offered by Intelsat. They may also include some, but not all, of the services currently offered by Intelsat. Proponents of alternative satellite systems contend that the new systems would provide services different from those Intelsat offers. Other observers have argued that the proposed services are complementary to Intelsat's and thus would stimulate demand for them. On the other hand, opponents of the alternative systems argue that the proposed systems would provide the same services as Intelsat and, therefore, any traffic obtained by these new services would be traffic diverted from Intelsat. We invite comments on these arguments. Commenters should identify the differences and similarities between the services available from Intelsat and those proposed by the alternative systems. Specifically, commenters should also identify their bases for differentiating one service from another. Can services be defined by technical characteristics? If so, what are the

technical dividing lines? Can services be grouped according to the characteristics of the user and, if so, what are those characteristics? Should we differentiate services for high-volume use from those for low-volume or occasional use? To what degree are services substitutable? Are services distinguishable where a system is fully digital? Commenters should also address whether the services can be differentiated on the basis of pricing techniques, marketing strategies, or geographic areas.

33. Second, as noted in paragraph 5, above, the Commission has received a letter signed jointly by the Secretary of Commerce and the Secretary of State setting forth "criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests." The letter states that, prior to "final authorization by the Commission," the alternative satellite systems are "to be restricted to providing services ... for communications not interconnected with public-switched message networks." We invite comments on these "criteria." Commenters should address whether and to what extent such a restriction could be implemented in actual practice. Commenters should also attempt to identify the specific services which would fall within and outside the scope of the restriction and state the basis for so classifying such services. For example, many users of "public-switched message networks" employ private branch exchanges ("PBX's") capable of routing incoming traffic back out over the switched network. Would the restriction recommended by the State and Commerce Departments prohibit service by alternative systems to customers using PBX's at both ends of the satellite communication and, if so, how should such a prohibition be enforced?

34. Commenters should also focus on the effect such a restriction could have on the competitive viability of the alternative systems. In particular, we seek comments as to whether the recommended restriction would give Intelsat an incentive to engage in price discrimination between circuits that it leases to provide non-switched services like IBS, when it would face competition from alternative systems, and circuits that it leases to provide switched services. In addition, comments should include information and current data on the traffic volume of non-switched services, the projected demand for such services, the proportions of total international services represented by switched and non-switched services, the revenues attributable to each, the number of satellite transponders currently devoted to offering each service, and the amount of non-switched traffic the alternative systems can expect to carry, factoring in any projected increases in current traffic levels.

35. Third, if the new systems would offer services that are substantially equivalent to Intelsat's, there may be a potential for traffic diversion. The Commission seeks information regarding the foreseeable

extent of the potential diversion. We solicit comments analyzing the amount of additional capacity that the alternative systems would introduce, with an explanation of the method used to measure that capacity, as compared to Intelsat's current (operational) capacity as well as its planned capacity over the useful life of each alternative system. Commenters should identify the alternative systems' capacity as a percentage of the increase in traffic projected during the useful lives of the alternative systems' satellites, with an explanation of the methodology underlying any projections.[24]

36. Besides the alternative systems' capacity, other factors will determine whether such systems divert traffic, such as price-quality trade-offs between the services offered, the degree of differentiation between services, consumer responsiveness to price variations in the offerings of the various services, and the specific geographic and service markets selected for entry by the alternative systems. Comments should take these factors into account. Finally, commenters should specifically address how the level of potential diversion would be affected by restricting alternative systems to the non-switched market, as proposed in the State/Commerce letter.

37. Fourth, the new systems may stimulate demand for satellite services if price competition between systems develops and drives down prices. If demand is stimulated, the resulting increase in traffic may offset any shift of Intelsat's traffic to the alternative systems so that there is no overall decrease in Intelsat's traffic base. The Commission invites comments regarding the ability of new entrants to engage in price competition and the effect of such competition on Intelsat's prices and the demand for satellite services. Commenters should submit any traffic projections and analyses of changes in demand which take into account the possible stimulation of demand by the entry of alternative satellite systems. Commenters should also explain their method for identifying Intelsat's "prices." Specifically, commenters should address whether Intelsat's "prices" have the same function as other prices in the marketplace in terms of their impact on demand and resource allocation given that Intelsat's users are also owners who receive an annual revenue distribution from Intelsat.

38. Finally, the new systems may capture a part of the market previously served not by Intelsat but by submarine cables. With the introduction of fiber optic digital cables, satellites and cables will become increasingly interchangeable for many services (such as wide-band services or data transmissions) previously suitable only to provision via satellite. The Commission seeks assessments of the amount of traffic that

[24] Commentors may wish to consult the demand forecasts submitted by U.S. international carriers in the Commission's international facility planning proceedings.

could be attracted by the alternative satellite systems which would otherwise have been carried by submarine cables.

2. Revenue Impact

39. Each of the factors and possible scenarios regarding Intelsat's traffic base outlined in the preceding paragraphs will have a revenue impact on Intelsat. The Commission seeks all available data that would assist it in quantifying the overall impact of each on Intelsat's net revenues including data regarding changes Intelsat could effect in its costs in the long run. In addition, we solicit analyses of the relationship between changes in Intelsat's revenues and its ability to provide service. Comments should address the effect authorization of additional satellite systems would have on Intelsat's ability to provide global service as well as service in specific regions and markets. Commenters should include discussion of the revenue level at which Intelsat could be expected to curtail expansion of its system, but retain its existing level of service, and the level at which Intelsat would be unable to continue providing its existing service. We emphasize that comments and analyses on this topic must be fully supported by the data, models, assumptions, and methodologies used to develop them.

3. Competitive Response

40. If alternative satellite systems are established, competition between the new systems and Intelsat might prompt Intelsat to take responsive action, such as changing its rate levels, rate structure and service offerings or reconfiguring its satellites or transponders. The Commission seeks to identify Intelsat's options in terms of responding to competition as well as the constraints on Intelsat's behavior resulting from such factors as its sunk capital investments, technological inflexibilities, and the pricing elasticities of demand for the services it offers. We ask commenters to focus in particular upon the extent of Intelsat's ability to change its rate structure in response to competition taking into account the legal barriers, if any, commenters may have identified in response to paragraph 26, supra. Is Intelsat able to vary its prices to meet actual or potential competition? Commenters should identify any constraints on Intelsat's pricing flexibility which may exist and the modification of Intelsat's pricing structure, if any, which would be necessary to ensure that Intelsat remains a viable competitive entity. In particular, would Intelsat have an incentive to engage in price discrimination between the geographic markets where entry occurs and those where no entry is anticipated? If such price discrimination occurs how will it affect Intelsat's revenues and the sharing of Intelsat's costs among signatories? We invite comments as to each of these factors as well as any other marketplace realities which would limit Intelsat's competitive response.

41. There are other ways in which Intelsat could respond to competition. Intelsat could improve its economic efficiency by reducing its costs and by better meeting its customer service requirements. For example, Intelsat may be able to reduce its costs by modifying its investment program, reducing the amount of unused satellite capacity or taking greater advantage of technological change. Commenters should consider these factors in assessing Intelsat's response to new entry.

B. Impact on Users of International Communication Links

42. The establishment of alternative satellite systems will also affect users of satellite facilities, both the international service carriers who obtain satellite circuits to provide service to the public and consumers or end users. The Commission must insure that the policy it develops regarding alternative satellite systems takes into account the interests of both of these user groups. As discussed more fully below, we are seeking comments on the issues we have identified as pertinent to these groups.[25]

1. Service Providers

43. Satellite capacity is purchased by several U.S. international service carriers to provide their various services to the public. Changes in the suppliers of satellite circuits and in the available capacity will have, therefore, a significant effect upon U.S. service providers. We invite comments on the nature of that effect. We recognize, however, that the international service carriers have interests which may diverge. Thus, different carriers or groups of carriers could be affected differently by the entry of alternative satellite systems. For example, some international carriers have substantial investments in submarine cable facilities which might influence their choice of facility without regard to pricing differences which may exist between Intelsat and the proposed systems. In addition, some carriers may purchase capacity in any new systems while others would prefer to obtain tariffed, short-term services like those available from Intelsat. Accordingly, commenters should address these differences between service providers when they respond to the points raised below.

44. We believe there are a number of potential effects of new entry that would be relevant to carriers and international service providers. The most obvious potential effect is that competition between Intelsat and the new systems could drive down the prices that service providers pay to obtain satellite capacity. Competition may also stimulate changes in the quality or range of satellite services offered to carriers in ways that would affect various carriers differently. The availability and reliability of

[25] We invite parties to address the potential effects of new entry on foreign consumers, carriers, and service providers as well as U.S. consumers, carriers, and service providers.

satellite circuits may also change as a result of competition. We invite comments on the likelihood that competitive entry by alternative systems would produce changes such as these and on the nature and extent of such changes. We are interested specifically in receiving estimates of the rates that the alternative systems would charge for each of the various offerings they propose in their applications, including tariffed services and transponder sales or leases. Such estimates should be accompanied by comparisons of the rates proposed by the alternative systems and those currently available for similar offerings. Commenters should also address whether the introduction of these satellite systems would promote or hinder the ability of service providers to offer new or innovative services.

45. Several of the applicants before the Commission have proposed to sell transponders or lease them on a long-term basis. We invite comments on the benefits and disadvantages of permitting carriers to purchase transponders or lease them on a long-term basis. Commenters should consider such factors as the benefits of capitalizing costs versus treating them as expenses and the differences in terms of cost predictability between owning capacity and obtaining it on a tariffed basis. In addition, we invite comments regarding the effect of transponder purchases on the availability, price, quality, and reliability of satellite circuits.[26]

2. Consumers

46. We invite comments on the impact of authorizing alternative satellite systems upon consumers of international communication services. Will consumers, on balance, be better off if additional systems are authorized? Because certain users may be affected differently from other users by the entry of these new satellite systems, we ask that commenters address these differences. Comments should address whether the entry of these systems would increase or decrease the availability, price, quality, and reliability of satellite services provided to end users. In addition, we invite comments on whether the sale or long-term lease of transponders by the alternative satellite systems would create a "bypass" problem, i.e., whether end users would purchase transponders in such high numbers that the carriers would be left with too small a number of remaining users to price their services competitively.

C. Equipment Manufacturers

47. Satellite equipment, including that associated with the launch vehicle, space segment, and ground segment, is manfactured by a number of U.S. and foreign firms. Changes in the international satellite services market would have an impact on the world-wide satellite equipment industry. In order to assess this impact, the Commission requests

[26] See note 17, *supra* and text accompanying.

comments containing information on the revenues of companies in the satellite equipment market. We seek data and analyses that will assist us in determining the revenues earned by United States, European, Japanese and other satellite manufacturers, individually and as a group, from the sale of satellite equipment.[27] We request that the information provided break down the revenue data into the space segment, launch vehicle and earth station equipment categories. We are particularly interested in receiving comments regarding the size of the world-wide equipment manufacturing industry and the percentage of the sales and revenues of equipment manufacturing companies which are attributable to Intelsat purchases.

48. In addition, we invite comments as to whether the authorization of alternative satellite systems would increase the demand for satellite equipment. Authorization of the alternative systems could increase demand for two reasons. First, the new systems themselves would purchase satellite equipment. Second, if the introduction of competition between Intelsat and the alternative systems stimulates demand for satellite services (because competition has driven prices down or has stimulated innovative services), both Intelsat and the alternative systems may require additional equipment. We invite comments on these points. We also ask commenters to address whether there would be a quantifiable relationship between the increase in satellite equipment sales and the increase in demand for international communications services which might be created by the alternative satellite systems.

49. Commenters should also address the impact alternative systems may have on the price and technological development of satellite equipment. The introduction of these systems could produce scale economies or stimulate manufacturing innovations that would permit lower prices overall for satellite equipment, which could, in turn, enable systems with smaller or specialized capacity to provide service at competitive prices. In addition, an expanded, competitive market for equipment may stimulate technological innovation in the design and performance of satellite equipment. The Commission solicits data and analyses regarding these possibilities and their effect on equipment manufacturers.

50. Finally, commenters should address the steps that the Commission could take to ensure that the market for such equipment is vigorously competitive. Specifically, commenters should identify the policies, rules, or other action required to protect domestic manufacturers from the anti-

[27] Satellite equipment companies who respond to this Notice but are reluctant to provide such information because they believe it to be proprietary are advised to consult the Commission's Rules regarding requests for confidential treatment of submissions. See 47 C.F.R. § 0.459 (1984).

competitive actions, if any, of foreign entities. Commenters should also discuss the limitations on the Commission's ability to take such steps.

D. Alternative Methods for Promoting Efficiency

51. In addition to the introduction of alternative satellite systems, other mechanisms may exist which would increase efficiency in the provision of international satellite services. The Commission invites comments on possible options to increase efficiency. One option which commenters may wish to address is the role that direct access by U.S. carriers to the Intelsat space segment could play in the future. The Department of State and the Department of Commerce have indicated their belief that affording companies in addition to Comsat the option of dealing directly with Intelsat for competitive services is a necessary step to ensure that additional facilities are constructed only where economically and technically justified. Commenters are invited to address whether such an option would be economically and technically feasible in the environment which would be created through the entry of alternative satellite systems. Commenters addressing this issue may wish to consider the record in the Commission's proceeding on direct access. *See* Regulatory Policies Concerning Direct Access to Intelsat Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982) (notice of inquiry); FCC No. 84-129, 49 Fed. Reg. 19132 (1984) (report and order terminating the proceeding). While the decision on direct access was settled in the context of today's environment, the potential for separate international systems introduces new factors that may make direct access more feasible.

E. Marketplace Trends

52. The applicants before this Commission are not the first to propose the establishment of satellite systems other than Intelsat to provide international services. As we noted in paragraph 20, above, Intelsat has previously coordinated four systems providing service between countries served by Intelsat. In addition, there are a number of newly-proposed satellite systems which would be capable of providing international as well as domestic service. The United Kingdom has proposed the UNISAT system whose beam would cover the U.S. eastern seaboard and most of western Europe. France has proposed the TELECOM satellite whose beam would cover most of Europe and the French Caribbean, Eastern Canada, and the Indian Ocean. Spain has proposed the IBEROAMERICAN satellite whose beam would cover Spain and Latin America. Other systems have also been proposed by Japan for the Pacific Basin, by Sweden for all of Scandanavia, and by Luxembourg for western Europe and possible transatlantic service.

53. The satellite systems listed above are not the only proposed or existing facilities which could have an impact on Intelsat's position in the market for international telecommunications service. Fiber optic cables are capable of providing many of the services that were previously available only via satellite due to the limitations inherent in analog cable technology. Moreover, fiber optic cables will introduce low cost, high capacity facilities into the international marketplace.

54. The Commission invites comments analyzing whether the structural and technological initiatives identified above represent an inexorable trend away from preservation of Intelsat's unique position as a provider of international satellite services. Are alternative satellite systems an inevitability? What forces in the global market confronting Intelsat contribute to this proliferation in alternative systems? What indications are there that other countries, besides the United States and the six countries identified above, are likely to establish alternative systems? Commenters are invited to submit all available data and analyses that would be helpful in characterizing the marketplace context in which satellite services are offered.

IV. Technical Issues

55. We also seek comment on certain technical issues regarding the efficient use of the electromagnetic spectrum and the geostationary-satellite orbit. Recently, the projected demand for orbital positions over the Atlantic Ocean has increased markedly for satellite networks, such as those proposed by the alternative systems, that would be operated in the 4/6 GHz and 11-12/14 GHz frequency bands. In particular, Intelsat has indicated that it plans to use a number of orbital positions over the Atlantic to provide its Intelsat Business Services as well as its more traditional services. In some cases, Intelsat's projected requirements would be in conflict with orbital positions requested by applicants for domestic and alternative international satellite systems.

56. Some observers have argued that a common-user system such as Intelsat's would more efficiently use the spectrum/orbit resources. However, other observers have argued that the use of individual networks, such as those proposed in the pending applications, would not necessarily be less efficient. Furthermore, these observers contend that in order for any satellite system to satisfy user demand for particular types of services — such as high-speed data services without intervening terrestrial links — the system would have to use satellite and earth station configurations or operational techniques which would be less efficient than other configurations, regardless of whether they are common-user systems. We believe that, in many cases, the extent to which a satellite network includes features which make it more spectrum/orbit efficient is determined by the economic incentives of the network

operator, whether the network is a common-user network or one of many individual networks. We request comments on the impact of the proposed systems on spectrum/orbit efficiency and seek, specifically, comments on the extent to which we can rely on economic incentives to achieve greater efficiency.

57. In licensing networks in the domestic fixed-satellite service, we have implemented technical standards intended to allow for the greatest number of satellites in the geostationary orbit and the greatest efficiency of those satellites.[28] In particular, these standards are designed to permit satellites operating in the same frequency bands to be located as close together as two degrees of orbital arc. We note that some of the applicants for authority to provide international service propose to engineer their networks to permit the location of other satellites, operating in the same frequency bands and having a common service area, within two degrees. The standards also require "full frequency re-use," to insure that the usable communications bandwidth on domestic satellites approaches 1000 MHz, and a minimum total transponder power capability for each satellite operating in a given band. The "full frequency re-use" and minimum power standards for domestic satellites cannot be directly applied to the proposed international systems because of the number of beams to be employed by those systems and the international treaty constraints on frequency use. However, some variation of these standards may be appropriate. Therefore, we also request comments on whether, and if so, to what extent, we should apply the standards developed for the domestic fixed-satellite service to any networks authorized for international service.

V. Conclusion

58. The Commission's overriding concern is to develop a policy with respect to the establishment of alternative satellite systems that will be based on an accurate assessment of the legal and economic issues raised by such systems. The information solicited above will be used to insure that our assessment reflects current marketplace realities. We encourage interested parties to submit data that is responsive to these concerns. We believe that the schedule that we are setting up for the submission of comments and replies is sufficient for parties to develop complete, current, and responsive data and analyses. Accordingly, motions for extension of time or late-filed pleadings will be viewed disfavorably.

59. We instruct the Chief, Common Carrier Bureau, to supplement the record by obtaining any information necessary for the conduct of this proceeding.

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[28] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 48 Fed. Reg. 40,233 (1983).

60. For purposes of this non-restricted, informal inquiry and rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of inquiry and proposed rulemaking until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceedings. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. § 1.1231.[29]

61. IT IS ORDERED, pursuant to Sections 4(i), (j), 214(d), 303(r), 309 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214(d), 303(r), 309, 403 (1984), Sections 102(d), 201(c)(3), (4), (9), and (11) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§ 701(d), 721(c)(3), (4), (9), (11) (1984), Section 553(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1984), and Sections 1.412 and 1.430 of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.412, 1.430 (1984), that an inquiry and proposed rulemaking into the above-captioned matter is instituted.

62. IT IS FURTHERED ORDERED that interested persons may file comments on matters raised herein on or before February 14, 1985 and reply comments on or before March 7, 1985.

63. IT IS FURTHERED ORDERED that, in accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § 1.419 (1984), all participants in the proceeding ordered herein shall file with the Commission an original and five (5) copies of all comments and reply comments. In reaching a decision, the Commission

[29] As provided in the Commission's public notice, Report No. I-3057, Mimeo No. 4716 (June 7, 1984), the satellite applications before us are governed by the *ex parte* rules which apply to restricted adjudicative proceedings, and therefore communications concerning those particular satellite applications will not be permitted in these proceedings. *See* 47 C.F.R. § 1.1223 (1984).

may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. Copies of comments and reply comments filed in this proceeding shall be available for public inspection during regular business hours in the Commission's reference room at its headquarters at 1919 M Street, N.W., Washington, D.C.

64. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because this proposed rule or policy will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. §§ 603, 604, 605(b) (1984). The proposed rule or policy will not have a significant economic impact on a substantial number of small businesses or other small entities because the Commission has not received, and does not anticipate receiving, a substantial number of applications from small businesses for authority to construct and operate satellite systems providing international communications services.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT A

THE WHITE HOUSE

WASHINGTON

November 28, 1984

Presidential Determination
No. 85-2 ___

MEMORANDUM FOR THE SECRETARY OF STATE
THE SECRETARY OF COMMERCE

By virtue of the authority vested in me by the Constitution and statutes of the United States, including Sections 102(d) and 201(a) of the Communications Satellite Act of 1962, as amended (47 U.S.C. 701(d), 721(a)), I hereby determine that separate international communications satellite systems are required in the national interest. The United States, in order to meet its obligations under the Agreement Establishing the International Telecommunications Satellite Organization (INTELSAT) (TIAS 7532), shall consult with INTELSAT regarding such separate systems as are authorized by the Federal Communications Commission. You are directed jointly to inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests.

This determination shall be published in the *Federal Register.*

ATTACHMENT B

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

November 28, 1984

Honorable Mark S. Fowler
Chairman
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Chairman:

The President has determined that separate international communications satellite systems are required in the national interest. He has also directed that we inform the Federal Communications Commission of criteria necessary to ensure the United States meets its international obligations and to further its telecommunications and foreign policy interests. Prior to final authorization by the Commission of any systems, to assure that the United States meets its obligations as a Party to the Agreement Establishing the International Telecommunications Satellite Organization (INTELSAT) (TIAS 7532):

(1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service); and,

(2) one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm.

The President's determination, its conditions, and these criteria are premised on our review of the issues prompted by the applications now before the Commission. If proposals substantially different are forthcoming, further Executive Branch review may be required.

The Commission should afford interested parties an opportunity to submit timely comments on the pending applications in view of these Executive Branch recommendations.

A memorandum of law concerning Article XIV of the INTELSAT Agreement is enclosed.

Sincerely,

Secretary of State

Secretary of Commerce

Enclosure

Common Carrier, International Record Carrier
International Record Carrier, Rates, Tariffs
Tariff, Just and Reasonable Charges

Commission finds that bundling the costs of telex operating supplies into telex transmission rates for directly connected customers constitutes unlawful subsidization of unregulated supplies by regulated transmission charges. The International Record Carriers and other providers of telex service are ordered to unbundle and detariff operating supplies and to file revised tariffs reflecting the removal of supply costs from telex transmission rates.
—ITT World Communications, Inc.
CC Docket No. 80-339

FCC 85-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	CC Docket No. 80-339
ITT World Communications Inc.	Transmittal Nos. 2258, 2259, 2260 and 2280
RCA Global Communications Inc.	Transmittal Nos. 4610, 4611, 4613, 4614, 4615, 4616 and 4636
TRT Telecommunications Corporation	Transmittal Nos. 909, 910 and 911
Western Union International, Inc.	Transmittal Nos. 1430, 1431 and 1447
FTC Communications Inc.	Transmittal Nos. 69 and 77
Revisions to tariffs establishing separate charges for telex terminal operating supplies.	

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 1985; Released: January 23, 1985

BY THE COMMISSION:

1. This Memorandum Opinion and Order continues to implement the policies established in a number of Commission decisions and the Record Carrier Competition Act of 1981 (RCCA)[1] by requiring the unbundling and detariffing of charges for telex operating supplies[2] from telex rates. This order resolves an issue raised in the Commission's *Investigation Order*[3] and establishes that the provision of telex operating supplies is not a transmission-related service.[4]

I. Background

2. In February 1980, we issued our *Unbundling Order*[5] in Docket No. 21005 which required that the international record carriers (IRCs) abandon their unified rate structure and unbundle the costs of terminal equipment from their international telex rates. In 1979, shortly before the issuance of the *Unbundling Order,* the IRCs had filed tariff revisions that proposed a $.55 per minute reduction in their telex rates. The IRCs characterized this discount as "optional unbundling," and stated that it complied with the *Unbundling Order*'s proscription of unified rate structures. We concluded that, while this discount represented a step in the right direction, a paucity of cost data made it impossible to determine whether all non-transmission costs had been unbundled from the transmission rates. In August 1980, we decided to investigate the IRC telex rate revisions and issued an *Investigation Order* in CC Docket No. 80-339.[6] That order allowed the $.55 reduction to become effective, but

[1] 47 U.S.C. § 222 (Supp. V 1981).

[2] "Operating supplies" are typically defined in the IRC tariffs to include teleprinter tape, rolls and ribbons. For purposes of this order, the Commission will consider "supplies" to include all materials used in conjunction with telex terminal equipment.

[3] ITT World Communications Inc., CC Docket No. 80-339, 79 FCC 2d 173 (1980), *issues modified,* Mimeo No. 34904, released August 18, 1980 (Transmittal Nos. 2258, 2259, 2260 and 2280).

[4] Western Union International Caribbean, Inc. (WUIC) was originally a party to this proceeding. Subsequent to the initiation of this proceeding, WUIC was purchased by the Puerto Rico Communications Authority (PRCA). WUIC no longer exists as a corporation, and PRCA does not include in its telex tariff the charges that are at issue in this proceeding.

[5] Interface of the International Telex Service with the Domestic Telex and TWX Service, Docket No. 21005, 76 FCC 2d 61 (*Unbundling Order*); *stay denied,* 77 FCC 2d 929 (*Denial of Stay Order*); *reconsideration denied,* 82 FCC 2d 390 (1980); *aff'd sub nom.* Western Union Telegraph Co. v. FCC, 665 F.2d 1126 (D.C. Cir. 1981).

[6] *Supra,* note 3. Although the investigation established in this order was closely related to the *Unbundling Order* in Docket No. 21005, it was designated Docket No. 80-339.

initiated a formal investigation to determine whether sufficient unbundling had taken place. In this investigation, the IRCs were required to submit cost data regarding (1) international telex transmission, (2) customer premises equipment (CPE), (3) local access rates, (4) operating supplies and (5) domestic transmission of inbound and outbound traffic.

3. In the course of the Docket 80-339 investigation, in May 1981, we issued our *Detariffing Order,*[7] which required that the IRCs maintain separate books of account for their telex terminal equipment offerings and warned the IRCs against subsidizing their deregulated terminal equipment offerings with earnings from regulated services.[8] In compliance with the *Detariffing Order,* the IRCs filed tariff revisions unbundling and detariffing CPE on August 1, 1981. On December 29, 1981, the RCCA was promulgated. This act amended Section 222 of the Communications Act of 1934, 47 U.S.C. § 222, and effectively codified our policies regarding the detariffing of IRC terminal equipment: "[R]ecord carriers shall not impose upon users of any regulated record communications services the costs of any other services or facilities (including terminal equipment), whether regulated or unregulated."[9]

4. This order clarifies one issue raised in the *Investigation Order:* the treatment of operating supplies used in telex services. Currently, all IRCs offer operating supplies as part of their telex service to those customers who maintain direct tielines to the carrier, but do not make the same offering to customers who are not directly connected.[10] If supplies are

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[7] Interface of the International Telex Service with the Domestic Telex and TWX Service, Docket No. 21005, 86 FCC 2d 411 (1981), *aff'd sub nom.* Western Union Telegraph Co. v. FCC, 674 F.2d 160 (2nd Cir. 1982) (*Detariffing Order*). All other CPE owned by record carriers was detariffed by the Commission in Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (*Second Computer Inquiry*), CC Docket No. 81-893, Fourth Report and Order, FCC 84-511 (released November 5, 1984).

[8] *Id.* at 419. The *Detariffing Order* specifically applied to the IRCs policies established in Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 77 FCC 2d 384 (1980) (Final Decision); *reconsideration,* 84 FCC 2d 50 (1980); *further reconsideration,* 88 FCC 2d 512 (1981); *aff'd sub nom.* Computer & Communications Indus. Assoc. v. FCC, 693 F.2d 198 (D.C. Cir. 1982); *cert. denied sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 103 S. Ct. 2109 (1983) (hereinafter collectively referred to as *Computer II*). 86 FCC 2d at 422. In *Computer II,* the Commission amended § 64.702 of its rules to reflect its finding that, *inter alia,* the offering of CPE is not a common carrier activity and is severable from the provision of common carrier transmission services.

[9] 47 U.S.C. § 222(b)(2) (Supp. V 1981). The importance of this provision is emphasized in the accompanying House Report which noted that Section 222(b)(2) contained an " . . . explicit prohibition against cross-subsidies." H.R. Rep. No. 356, 97th Cong., 1st Sess. 7 (1981).

[10] The provision in the tariff of FTC Communications, Inc. (FTCC) is typical of the IRCs' arrangements. It states that, "The Company as part of its telex service, will furnish to its tieline customers essential operating supplies consisting of teleprinter tape, teleprinter

characterized as an integral part of transmission service, then their costs can be bundled into the telex rates; on the other hand, if they are treated as part of telex terminal equipment, Commission policy and the RCCA require that they be unbundled and detariffed.

II. Contentions of Parties

5. During the Docket No. 80-339 investigation, we received direct cases from the IRCs and from other parties supporting both positions. In its direct case, TRT Telecommunications Corporation (TRT) argued that bundling operating supply costs into telex transmission rates is justified because telex supplies are so closely related to telex usage.[11] TRT maintained that it should be allowed to recover its paper and supply costs in its telex rates because the practice (1) is convenient to customers, (2) gives the carrier promotional benefits, (3) allows customers to procure paper and supplies from other sources, (4) involves total costs which are too insignificant to regulate and (5) does not conflict with the goals of the *Unbundling Order*.[12]

6. RCA Global Communications, Inc. (RCAGC), on the other hand, argued that the use of "regulated" paper and supplies on "unregulated" machines is technically inconsistent and administratively impracticable. RCAGC stated that the carriers could not "seek to circumvent regulation through an unregulated subsidiary, while at the same time providing 'free' paper and supplies for use on that equipment, the cost of which is presumably borne by its regulated common carrier operations."[13] While no other IRC addressed the operating supplies issue in its direct case, ITT World Communications Inc. (ITTWC) commingled operating supply costs with the costs of printers and "other expenses of a similar nature" in its cost support statements.[14]

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rolls and teleprinter ribbons at its own expense." FTC Communications Inc. Tariff F.C.C. No. 17, § C, para. 15.15. Similar provisions are in the tariffs of ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation, and Western Union International, Inc. On November 27, 1984, ITT World Communications, Inc. filed Transmittal No. 2647, which proposes to remove the provision offering operating supplies from its tariff. This tariff revision does not effect a reduction of telex rates commensurate with the removal of operating supply costs.

[11] Direct Case of TRT Telecommunications Corporation, filed December 10, 1980, CC Docket No. 80-339, at 10-15; Response of TRT, filed June 5, 1981, CC Docket No. 80-339, at 6. *See also Investigation Order*, 79 FCC 2d at 180-81.

[12] Direct Case of TRT at 10-15.

[13] RCAGC, filed May 14, 1981, CC Docket No. 80-339, at 8 and 9. It should be noted that, while RCA currently offers paper and supplies to its directly-connected customers, it states that it does so as a necessary competitive response to TRT's offerings. *Id.* at 9.

[14] Statement of ITTWC, filed December 8, 1980, CC Docket No. 80-339, Appendix - Explanation and Data Supporting Telex Access Pricing, at 8; ITTWC Responses to Information Requests, filed April 14, 1981, CC Docket No. 80-339, at 4.

7. Other arguments against the inclusion of operating supply costs in telex rates were raised by manufacturers of terminal equipment. Trans-Lux Corporation (Trans-Lux) charged that, because the IRCs subsidize their costs of operating supplies with excessive and illegal transmission costs, non-carrier suppliers are precluded from marketing paper and other supplies in competition with the IRCs. Trans-Lux further argued that "[t]erminal equipment uses paper of different grades and qualities, and the consumer should be given the opportunity to make his own choice, relying on his own enlightened self-interest."[15] Finally, a number of other businesses commented on this issue. Gragg & Associates, Inc.,[16] Tele-Techniques, Inc.[17] and Consolidated Terminal Systems, Inc.[18] all filed informal complaints stating that the IRCs' bundling of operating supplies into telex transmission rates constituted predatory pricing which understated the actual costs of the supplies and placed independent companies providing telex operating supplies at an unfair competitive disadvantage.

III. Discussion

8. In evaluating the propriety of bundling the costs of operating supplies into telex transmission rates, the Commission must decide whether such supplies should be classified as part of telex transmission or as part of terminal equipment, and whether the detariffing of supplies would necessitate a revision of the existing telex rates. In an earlier order in Docket No. 21005 (*Denial of Stay Order*), we expressed a tentative view that supplies are more closely related to telex terminal equipment than to telex transmission.[19] In that order, we stated that "a cost-based rate structure which separates the provision of terminal equipment and network access — *as well as all necessary supplies* — from transmission ... will serve the public interest."[20] (Emphasis added.) Later, in the *Investigation Order,* we reiterated that view saying that "customers who originate their calls by way of a domestic carrier cannot take advantage of the 'free' supplies, and customers who are directly connected to [an IRC] should have the option of obtaining paper and other supplies from any source"[21] Because of a procedural point raised by one of the parties, however, we agreed to examine in our investigation the claim that

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[15] Trans-Lux Corporation's Petition for Rejection or Suspension of ITTWC Transmittal No. 2347, filed June 19, 1981, at 5; *see also,* Reply Case of Trans-Lux, filed May 14, 1981, CC Docket 80-339, at 3.

[16] Letter dated August 11, 1980 from J. Gragg of Gragg & Associates, Inc.

[17] Letter dated September 16, 1980 from John M. Sabin, President, Tele-Techniques, Inc.

[18] Letter dated September 23, 1980 from Charles E. Grob, Vice-President, Marketing, Consolidated Terminal Systems, Inc.

[19] 77 FCC 2d at 937.

[20] *Id.* at 937-38.

[21] 79 FCC 2d at 181.

supplies should not be unbundled from telex rates.[22]

9. The record before us confirms the view we expressed in the *Denial of Stay Order* and the *Investigation Order* that telex paper and supplies are more closely related to telex terminal equipment than to telex transmission. Furthermore, we find merit in RCAG's argument that a regulatory scheme that detariffs terminal equipment but regulates the paper and other operating supplies that are used in conjunction with that equipment is impracticable. Similarly, we accept Trans-Lux's argument that because terminal equipment uses different types and grades of operating supplies, costs will vary in relation to the type of CPE used, and not strictly in relation to the transmission service provided. This argument is supported by the bookkeeping practices of ITTWC, whose records show a functional similarity between operating supplies and terminal equipment.[23] In light of these findings, we reject TRT's argument that operating supplies are associated exclusively with transmission service and must therefore be defined as usage-related.

10. In addition, TRT's contention that operating supplies represent a "de minimis" cost element, insignificant for the purposes of rate regulation, is specious. TRT estimates that paper and supply costs amount to $.012 per minute of transmission. Assuming, *arguendo,* that TRT's cost estimates are accurate, the total costs of operating supplies during the course of a year could be substantial. This conclusion is supported by the statements of the terminal equipment suppliers, all of whom alleged that the IRCs were offering operating supplies at noncompensatory prices and that business accounts were lost to IRCs who offered free operating supplies.

11. Similarly, TRT's argument that customers are free to acquire operating supplies from other sources is not convincing. Absent a showing to the contrary, we must accept RCAGC's assumption that the costs of the "free" operating supplies are borne by the customers of TRT's regulated common carrier services. Whether or not these customers may choose to decline the free supplies, the apparent subsidization of the supply costs with revenues from regulated operations contravenes the policies we established in the *Detariffing Order.*[24]

12. Finally, TRT's arguments regarding the convenience of bundled rates to customers, promotional benefits to carriers, and the goals of the

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[22] *Id.*

[23] See note 14, *supra,* and accompanying text.

[24] This apparent cross-subsidization also contravenes the RCCA, which states that "[t]he Commission shall, to the maximum extent feasible, promote the development of fully competitive domestic and international markets in the provision of record communications services, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition". 47 U.S.C. § 222(b)(1) (Supp. V 1981).

Unbundling Order are moot under the *Detariffing Order* and the RCCA, which established an unequivocal proscription of bundled-rate schemes. In the *Detariffing Order,* we concluded that "[t]he structure [detariffing terminal equipment] established here eliminates disparate regulatory treatment and encourages the provision of new and innovative equipment and participation by all vendors on a competitive basis."[25]

13. In conclusion, we reject the arguments that provision of operating supplies should be characterized as a transmission-related service, and that other policy considerations justify the recovery of supply costs in telex transmission rates. We find that operating supplies are unregulated, nontransmission, cost items, subject to the same bookkeeping procedures as other nontransmission goods and services.[26] Therefore, we order all carriers who provide operating supplies as a part of their telex service to remove such provisions from their tariffs and to file tariff revisions which reflect the removal of supply costs from their telex service rates.

IV. Ordering Clauses

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 213, 218, 403 and 404 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 201-205, 213, 218, 403, and 404 (1976), and Section 1.1 of the Commission's Rules and Regulations, 47 C.F.R. § 1.1, the determinations set forth herein are adopted.

15. IT IS FURTHER ORDERED that domestic and international carriers providing telex service at rates which include the costs of operating supplies shall file appropriate tariff revisions to remove provisions associated with paper and supplies and to make appropriate rate revisions to reflect the elimination of attendant costs from the revenue requirements. These tariff revisions must be filed no later than twenty days from the release of this order, to be effective on not less than five days' notice. For this purpose, Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, is waived, and Special Permission No. 85-36 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[25] 86 FCC 2d at 420.

[26] The Commission needs to have available, for regulatory purposes, data that is not distorted by nontransmission activities. Therefore, we require a separate set of books to be kept by carriers who do not conduct these activities through a separate subsidiary. Of course, should a carrier establish a separate subsidiary to conduct such nontransmission activities, it would necessarily establish a separate set of books for that subsidiary because it would be a separate legal entity.

CATV Program Exclusivity, Network Programming
CATV Special Relief
RULES, WAIVER OF

Request for extension of waiver of Section 76.92(g) of the Commission's Rules granted for one-year period. Latest submissions by petitioner demonstrate continued volatility of situation, poor financial position, and impact on service to the public.
—*KDUB-TV, Inc.*

FCC 84-656

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re:	
KDUB-TV, Inc.	CSR-2369
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1984; Released: January 7, 1985

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

Introduction

1. On June 13, 1983, KDUB-TV, Inc. (hereinafter "KDUB-TV"), licensee of Station KDUB-TV (ABC, Channel 40), Dubuque, Iowa, filed a petition for special relief, seeking an extension of the waiver of Section 76.92(g) of the Commission's Rules which the Commission granted to KDUB-TV in *KDUB-TV, Inc.* (Dubuque, Iowa), 88 FCC 2d 450 (1981) (hereinafter *"KDUB III"), recon. denied,* 89 FCC 2d 994 (1982) (hereinafter *"KDUB IV").* KDUB-TV's petition is opposed by Cedar Rapids Television Company (hereinafter "KCRG-TV"), licensee of Station KCRG-TV (ABC, Channel 9), Cedar Rapids, Iowa, and KDUB-TV has replied.

2. This is the fifth time in nearly five years that the Commission has been asked to consider the effect of Section 76.92(g) of the Rules on KDUB-TV.[1] However, on June 19, 1981, KDUB-TV, after twice unsuc-

[1] Section 76.92(g) exempts significantly viewed signals from being blacked out pursuant to the Commission's network program nonduplication rule, and was adopted in the *Memorandum Opinion and Order in Docket No. 19995,* 67 FCC 2d 1303 (1978).

cessfully seeking relief, filed a new petition. In *KDUB III,* while denying relief with respect to two of the cable systems on which KDUB-TV sought waiver,[2] the Commission granted KDUB-TV a temporary waiver of Section 76.92(g) of the Rules on the system serving Dubuque, Iowa, and portions of Joe Daviess County, Illinois, then operated by TelePrompter of Dubuque, now operated by Group W Cable, Inc. (hereinafter "Group W"). The Commission found indications that circumstances had changed since its earlier denials of relief, including audience gains by KCRG-TV comparable to audience losses to KDUB-TV - especially during periods when KDUB-TV's programming was being duplicated by KCRG-TV; a decrease in KDUB-TV's cash flow; an increase in KDUB-TV's operating expenses which outstripped the station's revenue increases; and cutbacks by KDUB-TV to reduce expenses which ". . . clearly will impact on KDUB-TV's ability to provide service to its community." *KDUB III* at 461.[3] However, in view of the volatility of the situation and because the advertising data submitted by KDUB-TV were not conclusive, and in fact were matched by similar advertising losses to KCRG-TV, the Commission granted relief only for a period of twenty-four months, until November 19, 1983. *Id.* at 462. KCRG-TV filed for reconsideration of this decision, which the Commission denied in *KDUB IV, supra.*[4]

Summary of Pleadings

3. In support of its petition for extension, KDUB-TV argues that, because it again enjoys nonduplication protection, methods other than those traditionally utilized to analyze the effects of lost nonduplication protection must be the basis of the Commission's public interest analysis. KDUB-TV states that it has recovered its former audience levels, but that it has not exceeded them. This recovery, the station asserts, is due to its recovery of its lost nonduplication protection following *KDUB III, supra.*[5]

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granting recon. of 62 FCC 2d 99 (1976), *stay granted in part,* 68 FCC 2d 1308 (1978), *recon. denied,* 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. Federal Communications Commission,* 619 F.2d 314 (4th Cir. 1980). The rule became effective on May 29, 1980.

[2] These systems are Platteville Cable TV Corp., serving Platteville, Wisconsin; and Group W Cable of Galena, serving Galena and Hanover, Illinois.

[3] TelePrompter of Dubuque stated that it did not object to a grant of a temporary waiver. *KDUB III* at 453-454.

[4] KDUB-TV was instructed to file for an extension of this waiver, if it desired an extension, by May 19, 1983. On May 11, 1983, and again on June 9, 1983, KDUB-TV requested extensions of this filing date, which were unopposed. On November 18, 1983, KDUB-TV's waiver was temporarily extended for the period of time necessary for the Commission to render a decision on the merits of the instant petition. *KDUB-TV, Inc.,* Cable Television Action Report No. 2823, Mimeo No. 1023 (released November 28, 1983).

[5] KDUB-TV submits Arbitron audience data, and states that these data show that, while prior to losing nonduplication protection an average of 69% of Dubuque City and County ABC prime time viewers watched KDUB-TV and 31% watched KCRG-TV, these figures

Nevertheless, cautions KDUB-TV, competition in the market has been increased by Group W's expansion of its cable system from 12 to 35 channels in June 1982. Also, the station's financial position remains precarious,[6] and the City of Dubuque itself "has faced severe financial hardship" during the past year and a half. KDUB-TV contends that the existence of a separate Arbitron Area of Dominant Influence (ADI) significantly affects the station's national advertising revenues, noting that in the year following KDUB-TV's loss of its one-county ADI — Dubuque County — KDUB-TV's national advertising revenues dropped 0.3% (1982), following two years of increases (151% in 1980, and 27% in 1981). KDUB-TV also submits data on its cash flow, stating that overall cash flow has been negative since 1981.[7] The station further asserts that it has had to continue cuts in public service and locally-oriented programming, including eliminating another reporter, discontinuing the weekly public affairs program "Special Edition," maintaining a pay freeze since 1981, and signing off at 1:00 a.m. Technical and physical upgrading has been postponed, claims KDUB-TV, and local community leaders have urged continuation of nonduplication protection.[8]

4. In its opposition, filed July 13, 1983, KCRG-TV criticizes the Commission's decisions in *KDUB III* and *KDUB IV*, both *supra*. Citing these and similar decisions, however, KCRG-TV argues that KDUB-TV's evidence is insufficient to justify extension of its waiver. KCRG-TV contends that, in fact, since regaining nonduplication protection, "KDUB has lost a full share point while KCRG has gained 2.6 share points. Because protection is in effect, KCRG's gains obviously were not derived from KDUB's cable audience." (footnote omitted). KCRG-TV disputes KDUB-TV's stated need for an ADI, arguing that KDUB-TV's own submissions "show that KDUB's ability to attract income from national sources is not correlated with its ADI status," and that KDUB-TV's audience levels may not maintain an ADI for the station. KCRG-TV contends that KDUB-TV has not demonstrated a nexus between its financial status and nonduplication protection, noting that KDUB-TV's

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changed after the loss of protection to 52% watching KDUB-TV and 48% watching KCRG-TV. Since regaining protection, however, KDUB-TV states that it is now watched on average by 67% of ABC prime time viewers, while KCRG-TV is watched by 33% of such viewers in Dubuque City and County.

[6] KDUB-TV submits exhibits outlining its local and national advertising revenues, and advertiser responses to questionnaires concerning their reasons for advertising on KDUB-TV.

[7] According to KDUB-TV, its cash flow was as follows: 1979 [October - December] = $33,720; 1980 = $129,601; 1981 = ($3,376); 1982 = ($69,155); 1983 [January - April] = ($6,836).

[8] KDUB-TV submits letters of support from the Dubuque Cable Regulatory Commission, the mayor of Dubuque, and the Dubuque Area Chamber of Commerce.

expense increases above the inflation rate may be responsible for the station's negative cash flow in 1982. In addition, KCRG-TV states that KDUB-TV cancelled "Special Edition" after protection had been regained. KCRG-TV maintains that no justification today exists to protect KDUB-TV from marketplace competition.

5. KDUB-TV replied to KCRG-TV on August 2, 1983, arguing that KCRG-TV seeks to relitigate *KDUB III, supra.* KDUB-TV claims that analysis of average audience figures, as KDUB-TV has done, allows for a more accurate comparison of the effects of the presence or absence of nonduplication protection, which the station needs to maintain its audience levels. KDUB-TV states that its average total sign-on to sign-off audience, in terms of the number of households, has remained steady since July 1980, and that its local news programs continue to achieve "significant audience levels and consistently ranked first in viewership in Dubuque County." KDUB-TV asserts that the nexus between audience levels and advertising revenues is indisputable, and that a severe local recession in Dubuque has severely affected the station's local advertising revenues. At the same time, argues KDUB-TV, its lack of an ADI and a Nielsen Designated Market Area (DMA) has curtailed the station's national advertising revenues.[9] KDUB-TV submits a summary of its cutbacks in fiscal 1983, contending that it performed cutbacks across the board, and not merely in local programming. Moreover, KDUB-TV states, certain cost increases during fiscal 1982 were inevitable, such as costs for transmitter operation, news service subscription, employee health insurance, and interest expenses. KDUB-TV claims that KCRG-TV does not cover Dubuque news and public affairs adequately. KDUB-TV reiterates arguments made in prior cases, and urges making permanent or extending its waiver.

6. On August 22, 1983, KCRG-TV filed a "Request for Leave to File Rejoinder" and a rejoinder to KDUB-TV's reply, contending that KDUB-TV's reply raised new factual assertions. KCRG-TV argues that recent declines in KDUB-TV's viewership, which are matched in prior years, are real, and that KDUB-TV's new financial data, based upon a new fiscal year of July to June, do not support the station's claims. Finally, KCRG-TV states that it does cover newsworthy events and issues of concern to Dubuque.

7. On September 21, 1983, the Chief of the Commission's Cable Television Branch requested that KDUB-TV submit a clarification of the financial data provided, including a complete set of financial statements,

[9] KDUB-TV also argues that data from the National Association of Broadcasters show that the average smaller market UHF affiliate receives 40% of its revenues from national advertising sales, whereas KDUB-TV's 1982 "national advertising sales comprised less than 20% of its local revenue." (footnote omitted).

on or before October 10, 1983. KDUB-TV responded on October 7, 1983, submitting further financial data for its fiscal years 1980 through 1983. KCRG-TV responded on October 25, 1983, arguing that the additional data supported KCRG-TV's position that KDUB-TV's financial difficulties are not due to the lack of nonduplication protection or of an ADI, but are due rather to poor station management, and that KDUB-TV's cash flow has in fact been positive "in three of its last four fiscal years." KDUB-TV replied to KCRG-TV on November 1, 1983, challenging KCRG-TV's analysis, and noting that KDUB-TV's net income since 1980, while improving in FY 1983, totals a negative $883,144.

Discussion

8. At the outset (*see* paragraph 2, *supra*), we noted that this is the fifth time in four years that KDUB-TV has come before this Commission for relief. Indeed, on two of these occasions, *KDUB-TV, Inc.*, (Dubuque, Iowa), 83 FCC 2d 153 (1980), *recon. denied*, 85 FCC 2d 572 (1981), KDUB-TV was denied relief. Such a history highlights the extremely close nature of this case, in terms of determining where the public interest lies. On the one hand, "Presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule. An applicant for waiver faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). On the other hand, the hurdle cannot be set so high that it cannot be leaped absent the demise of the station: an agency must take a "hard look" at meritorious applications for waiver, *id.*, and must consider all relevant factors. Bearing these guidelines in mind, we turn to the merits of KDUB-TV's latest request for waiver.

9. Having been given the initial waiver, KDUB-TV cannot present an analysis which demonstrates the actual impact from the loss of nonduplication. *KDUB III, supra.* The difficulty of this case is compounded by fluctuations in the station's audience with the added protection.[10] Nevertheless, it is also clear that the financial status of KDUB-TV is not good. This station has suffered a net loss in each year of operation since its purchase in 1979. In FY 1983, the net loss equaled $176,368. An operating loss (before deductions for interest expense, other expense and other income items) of $38,599 was sustained. Current assets — which are increasing, but not fast enough to compensate for increasing current liabilities — equaled $274,602 in 1983, while current liabilities amounted to $1,746,034, leaving KDUB-TV with a $1,471,432 deficiency in working capital. In other words, KDUB-TV can afford to fulfill only 15.7% of its current obligations. KDUB-TV's equity account shows a deficit of

[10] As an example, KDUB-TV has once again lost its ADI, a situation it placed great weight on previously.

$764,775, indicating that, if operations were to cease today, ownership investors would suffer that amount of loss. There was a negative operating margin (as there has been since 1979) of 3.6% higher than revenues. The net margin was a negative 16.7%. Return on assets in 1983 was also negative, showing a loss of 17.8¢ on each dollar invested. Debt capital was equal to 176% of assets, indicating that KDUB-TV did not have enough collateral to cover as much as 76% of its debt obligations. While, financially, 1983 had been KDUB-TV's best year, and its cash flow was positive, the station's cash flow was not as large as it was in 1980 or 1981.[11] In contradiction of KCRG-TV's claims, KDUB-TV's management, according to the financial data submitted, is increasing its efficiency in its productive use of capital: KDUB-TV turned its capital over twice as much in 1983 as it did in 1979, despite a local recession. Nevertheless, the station's overall financial position remains poor. Indeed, KDUB-TV has had to continue cutbacks in local service and programming, some of which were previously noted. *See KDUB III* at 461. That some of these cutbacks may have been performed, as KCRG-TV notes, after nonduplication protection had been regained does not indicate a lack of correlation between the events. The impact of lost protection, as we have previously noted, is not necessarily felt overnight. *KDUB III* at 460.

10. In denying reconsideration of our grant of a temporary waiver to KDUB-TV, we reiterated "our consistent commitment to the proposition that regulatory intervention by means of waiver is warranted only if a station's ability to serve the public interest is threatened." *KDUB IV* at 998 (citations omitted). We further noted our "desire to return to a situation where there is over-the-air competition as soon as possible." *Id.* at 999. Balanced against these considerations, however, must be our equally consistent determination that preservation of a locally-oriented broadcast service should be a "fundamental underpinning" of our regulatory objectives. *See, e.g., Notice of Proposed Policy Statement and Rulemaking in Gen. Docket No. 80-603,* 86 FCC 2d 719, 737 (1981); FCC Network Inquiry Special Staff *Final Report* I-26 (October 1980). We further note again "the absence of any serious allegations of harm accruing to the public or to other parties should a waiver be granted. . . ." *KDUB III* at 462.[12] However, we do not believe that a permanent waiver is warranted because circumstances could materially change in the future. *See Desert Empire Television Corporation,* 91 FCC 2d 1178, 1189 (1982);

[11] Based on the further information submitted (*see* paragraph 7, *supra*), the staff has determined that KDUB-TV's cash flow in FY 1983 was $36,642, while in 1980 and 1981, the station's cash flow was $62,037 and $61,785, respectively. In 1982, KDUB-TV had a negative cash flow of $50,280.

[12] While KCRG-TV has claimed that grant of a waiver disadvantages it against its Cedar Rapids competitors, KCRG-TV has offered no substantiation of this claim.

KDUB II at 462. Nevertheless, in certain isolated cases, unique circumstances may call for temporary regulatory intervention to protect the public interest in the preservation of local broadcast service. That these circumstances are truly isolated is underscored by the fact that, since the adoption of Section 76.92(g) of the Rules, only two stations — KDUB-TV and Station KMIR-TV (NBC, Channel 36), Palm Springs, California — have been granted even temporary waivers of this rule, in both cases after initially failing to justify waiver. While factors other than nonduplication protection also seem to be affecting KDUB-TV,[13] this does not vitiate the impact that Section 76.92(g) of the Rules is having. Weighing all the facts and circumstances of the instant case, we shall grant KDUB-TV an additional temporary waiver of Section 76.92(g) of the Rules, limited to Group W's cable system, for a period of one year from the release date of this opinion. We do not contemplate granting any extensions of this waiver.

11. In view of the foregoing, the Commission finds that grant of KDUB-TV's petition, to the extent indicated above, is in the public interest.

12. Accordingly, IT IS ORDERED, That the "Request for Leave to File Rejoinder" filed August 22, 1983, by Cedar Rapids Television Company IS GRANTED.

13. IT IS FURTHER ORDERED, That the "Petition for Waiver of Section 76.92(g) of the Commission's Rules" filed June 13, 1983, by KDUB-TV, Inc. IS GRANTED to the extent indicated at paragraph 10, *supra,* and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[13] KDUB-TV itself notes a severe local recession and also a number of necessary major expenses (*see* paragraph 5, *supra*). We also note the high, though not unreasonable, interest expenses attributable to the purchase of the station in 1979. At the same time, there are apparently difficulties in eastern Iowa markets generally, and not just in Dubuque, which this Commission has previously recognized. *See KDUB III* at 462. Arbitron reports that the Cedar Rapids-Waterloo-Dubuque ADI has dropped since last year from #76 to #77.

Character Qualifications
Comparative Hearing
Issue, Enlargement of, Denied
Ownership and Management, Integration of

Review Board affirmed *ID* grants of FM permanent authority to 100% ownership-integrated applicant and AM to applicant with 60% credit who also sought FM. Latter's exception seeking additional 32% credit denied as proposing "variance" from application containing complete integration proposal specifying non-managerial duties. Former's exception seeking addition of fraudulent billing, failure to report felony conviction, and character (alcohol-drug use) issues, denied.
—*Leflore-Dixie, Inc.*
MM Docket No. 83-396

FCC 85R-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Leflore-Dixie, Inc. Greenwood, Mississippi	MM Docket No. 83-396 File No. BPH-810223AD
Mid-Delta Broadcasting, Inc. Greenwood, Mississippi	MM Docket No. 83-397 File No. BPH-810511AC
Ronnie J. Grantham Greenwood, Mississippi	MM Docket No. 83-398 File No. BPH-810511AE
For Construction Permit for a New FM Station	
Leflore-Dixie, Inc. Greenwood, Mississippi	MM Docket No. 83-400 File No. BP-810312AE
Mid-Delta Broadcasting, Inc. Greenwood, Mississippi	MM Docket No. 83-401 File No. BP-810511AN

Ronnie J. Grantham Greenwood, Mississippi	MM Docket No. 83-402 File No. BP-810511AR
For Construction Permit for a New AM Station	

Appearances

Forbes W. Blair and *William D. Silva,* on behalf of Leflore-Dixie, Inc.; and *Steven A. Lerman* and *Dennis P. Corbett,* on behalf of Ronnie J. Grantham.

DECISION

Adopted: February 22, 1985; Released: March 4, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING WITH STATEMENT.

BOARD MEMBER JACOBS:

1. Two of four original mutually exclusive applicants, Leflore-Dixie, Inc. (Leflore-Dixie) and Ronnie J. Grantham (Grantham),[1] remain contenders for permanent authority to operate the existing facilities of broadcast Stations WSWG(AM) (1540 KHz) and WSWG-FM (Channel 256) at Greenwood, Mississippi.[2] By *Hearing Designation Order (HDO),* 48 Fed. Reg. 19467, published April 29, 1983, their applications were designated for consolidated hearing on the standard comparative issue only. The *HDO* left to the presiding officer the option of requiring the parties to express a preference for the AM or FM facility so that the best

[1] A third applicant, Mid-Delta Broadcasting, Inc., which was disqualified by the Initial Decision, *infra,* has not filed exceptions. Accordingly, its applications will be dismissed for failure to prosecute. Section 1.276(f) of the Rules, 47 CFR §1.276(f). The fourth applicant, East Delta Communications, Inc., which filed for the FM facility only, was previously dismissed at its own request by the presiding officer. *Order,* FCC 83M-4361, released November 25, 1983.

[2] Previously, the Commission denied the license renewal applications of Leflore Broadcasting Company, Inc. (WSWG) and Dixie Broadcasting Company, Inc. (WSWG-FM). *Leflore Broadcasting Co., Inc.,* 65 FCC 2d 556, 41 RR 2d 379 (1977), *recon. denied,* FCC 78-432, released July 20, 1978, *aff'd,* 636 F.2d 454 (D.C. Cir. 1980). The stations have been operated on an interim basis, initially by the former station employees who now appear before us as Leflore-Dixie seeking permanent authority. Grantham Br. at 2 n.1, Reply Br. at 10 n. 15; Leflore-Dixie Br. at 1-2. Subsequently, a joint venture of all the applicants for permanent authority was granted interim authority, *Leflore-Dixie Employee Venture,* 90 FCC 2d 951 (Rev. Bd. 1982), but Leflore-Dixie and Mid-Delta withdrew from the venture.

comparative applicant would be granted the *one* station it most desired and the second best applicant would be awarded the remaining construction permit. *Id.*, at para. 2 (*citing Webster-Baker Broadcasting Co.*, 71 FCC 2d 333, 45 RR 2d 724 (1979)). In an Initial Decision (I.D.), FCC 84D-56, released August 22, 1984, presiding Administrative Law Judge Joseph Chachkin (ALJ) stated that award of both licenses to a single applicant would offend the Commission's diversification policies, recounted that both applicants had indicated a preference for the FM channel, found Grantham to be comparatively superior, and therefore granted Grantham's application for the FM station and Leflore-Dixie's application for the AM facility. I.D., para. 52.

2. The proceeding is now before the Review Board on exceptions filed by both applicants. While Leflore-Dixie essentially argues that it is the better applicant and therefore should have received the FM grant, Grantham seeks to remand the proceeding on new issues pertaining to Leflore-Dixie's basic qualifications. We have reviewed the I.D. in light of the exceptions and reply briefs and our examination of the record.[3] We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate conclusion that Grantham is the superior comparative applicant and should be awarded the FM grant and that no additional issues should be added against Leflore-Dixie, which is also qualified to be a licensee and deserving of the remaining AM grant.

3. *Leflore-Dixie's Exceptions: Integration of Ownership and Management.* The ALJ credited Grantham, a sole proprietor, with 100% full-time integration credit for his proposed role as general manager; he also awarded Leflore-Dixie 60% full-time credit for the proposed participation of Keith Worrell, Jr. (44% owner) as general manager, Anthony Browning (8%) as sales manager, and Hardin Browning (8%) as program director. Based on this 40% quantitative integration credit differential, the ALJ gave Grantham a substantial integration preference over Leflore-Dixie. I.D., paras. 15-17, 19, 31-32, 48, 50, 52. He considered, and specifically rejected, Leflore-Dixie's claim for an additional 32% full-time credit for the proposed participation of four 8% stockholders: James Brown and David Browning as announcers, Susan Mansfield as traffic manager, and Alice C. Worrell as in charge of bookkeeping/accounting. *Id.*, paras. 20-23, 48. In its exceptions (Br. at 2-12), Leflore-Dixie renews this claim; we affirm the ALJ's rulings and supporting analysis.

4. In response to Question 27 of its applications (FCC Form 301), which called for the "name(s) and position of the person(s) who determines

[3] Oral argument was not requested and, in any event, it would not have aided materially in the resolution of this case. *See* Section 1.277(c) of the Rules, 47 CFR §1.277(c); *Van Buren Community Service*, 87 FCC 2d 1018, 1019, 50 RR 2d 115, 117 (Rev. Bd. 1981).

the day-to-day programming, makes decisions, and directs the operation of the station," Leflore-Dixie responded:

> Keith Worrell will be the full time general manager who will make the major decisions and will direct the operator [sic] of the station. All stockholders will be integrated into the day-to-day operation of the station as follows:
>
> Hardin Browning - Program Director
>
> Tony Browning - Sales
>
> David Browning - Announcer
>
> * * * * *
>
> James Brown - Announcer
>
> Susan Mansfield - Traffic
>
> Alice C. Worrell - Bookkeeping/Accounting.

At hearing, Leflore-Dixie sought to show that James Brown, in addition to announcing, would also be Director of Public Affairs and Director of Training of Prospective Minority Employees, that announcer David Browning would serve as Director of Community Affairs, and that traffic director Susan Mansfield would also be Woman's Director; however, the ALJ rejected Leflore-Dixie's attempt as an impermissible upgrade from the complete ownership integration description it gave in its application. *See* Leflore-Dixie Exhs. 1, 6-8; Tr. 33-51, 99-115; *see also* Leflore-Dixie Statement Concerning Principals To be Integrated, filed July 18, 1983.

5. It has long been recognized that Question 27 does not call for an applicant's complete integration proposal and that, consistent with its response to that application question, it may more fully explicate its proposal at hearing. *See, e.g., WHW Enterprises, Inc.*, 89 FCC 2d 799, 817, 51 RR 2d 409, 421 (Rev. Bd. 1982), *review denied,* FCC 83-368, released September 15, 1983, *rev'd in part and remanded on other grounds,* No. 83-2067 (D.C. Cir. February 5, 1985). Nevertheless, and as Leflore-Dixie concedes (Br. at 11), when an applicant chooses to list its integration plans in response to Question 27, it is estopped from varying from those plans at hearing. *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 493, 55 RR 2d 1299, 1305 (Rev. Bd.), *recon. denied,* 56 RR 2d 1260 (Rev. Bd. 1984). This enjoinder against "variances" serves to protect competing applicants against prejudicial post-cutoff date comparative upgrading, and thereby preserves the fairness of the hearing. *Gainesville Media, Inc.*, 72 FCC 2d 799, 804-805, 43 RR 2d 604, 610 (Rev. Bd. 1978), *review denied,* 72 FCC 2d 795, 45 RR 2d 1621 (1979).

6. Here, Leflore-Dixie's attempted assignment at hearing of new managerial titles and duties to David Browning, James Brown, and Susan Mansfield varied significantly from its representations of their more limited roles in its applications and therefore was properly rejected by the ALJ. Also, the hearing evidence describing their original duties (announcers and traffic director) reveals their roles to be non-managerial and non-

policymaking, and therefore ineligible for integration credit under established Commission precedent.[4] *See, e.g., Vactionland Broadcasting, supra,* 97 FCC 2d at 494, 55 RR 2d at 1305 (no integration credit for "typical broadcast employee functions" such as "supervising and managing the traffic and bookkeeping departments"), and cases cited therein; *see also Minority Broadcasters of East St. Louis, Inc.,* 56 RR 2d 275, 279-280 (Rev. Bd. 1984) (no credit awarded for "typical broadcast employee with programming responsibilities"; but credit awarded for persons with "true managerial functions"). Similarly, the ALJ properly withheld integration credit for the proposed bookkeeping/accountant role of Alice Worrell, which is non-managerial, *see Vacationland Broadcasting, supra.* We also reject Leflore-Dixie's attempts to analogize Ms. Worell's role to that of "business manager" or "station comptroller," positions which have been credited, *see, e.g., Alexander S. Klein, Jr.,* 86 FCC 2d 423, 430-432, 49 RR 2d 606, 612-614 (1981); *New Continental, supra,* 88 FCC 2d at 839, 50 RR 2d at 1125; *see generally, Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909-1910 (1965), because it has failed to show that she will actually perform the managerial/policy functions normally encompassed by those roles. In sum, the ALJ correctly awarded Leflore-Dixie only 60% full-time integration credit.

7. Leflore-Dixie (Br. at 14-15) also attacks the ALJ's accreditation of Grantham's proposed integration as full-time general manager. It points out that Grantham's response to Question 27 was simply "Ron Grantham/Applicant/Full-time" and avers that Grantham's at-hearing elaboration that he would be the station's "general manager" is a "variance" and should be stricken. Alternatively, Leflore-Dixie pleads that it has been accorded "disparate treatment" because Grantham received integration credit but Leflore-Dixie's attempt to "amplify" the integration proposals of an additional 32% of its ownership, *see* paras. 3-6, *supra,* was rebuffed. We flatly reject these nearly frivolous exceptions. Grantham's response to Question 27 simply pointed out that he himself, the 100% owner and actual applicant, would be the main station overseer. No particular station position was spelled out until the ALJ ordered the filing of integration

[4] Leflore-Dixie's citation (Br. at 7) to *Payne of Virginia, Inc.,* 45 FCC 2d 170, 174, 29 RR 2d 495, 501 (Rev. Bd. 1974), where integration credit was awarded a principal who would perform trafficking, bookkeeping, and programming functions in addition to local news coordination, is unavailing. In *Payne,* the principal, at least insofar as her programming and news coordination functions, appeared to have had some actual managerial duties in addition to non-managerial ones. Performance of some non-managerial functions does not necessarily negate integration credit for a principal who will also perform managerial functions. *Poet's Seat Broadcasting, Inc.,* 78 FCC 2d 1080, 1084, 47 RR 2d 1265, 1268 (Rev. Bd. 1980). In any case, our more recent precedent cited in the text makes clear that the employee-type functions at issue here are not entitled to credit.

statements — a completely proper procedure, *Metro Broadcasting, Inc.*, 57 RR 2d 440, 450 n.8, 451 n.9 (Rev. Bd. 1984). Grantham then specified that he would be the station's general manager. This is no variance at all, only an initial specification of a precise managerial role which was not inconsistent with and did not enlarge upon any previously stated role, and was therefore properly credited. *Id.* By contrast, and as fully explained *supra*, Leflore-Dixie had sought to impermissibly alter the complete integration proposal that it voluntarily chose to set forth in its application, and was barred from doing so. Therefore, no question of unequal treatment is raised.[5]

8. In view of our conclusion that Leflore-Dixie is entitled to 60% quantitative integration credit (para. 6, *supra*) and our agreement with the ALJ's award of 100% credit to Grantham (para. 7, *supra*), we do not reach Leflore-Dixie's exceptions regarding its comparative qualitative enhancements. Such qualitative differences cannot overcome a "clear" quantitative difference in integration credit, *New Continental, supra*, 88 FCC 2d at 850, 50 RR 2d at 1133 (12.5% difference is clear), and Grantham's 40% margin of superiority is more than sufficiently "clear" to garner a moderate overall integration preference, which is decisive in this case. *See, e.g., Georgia Mountain Corp.*, FCC 85R-10, released January 31, 1985, para. 11 (moderate preference for 40% vs. 0%); *WHW Enterprises, supra*, 89 FCC 2d at 817, 51 RR 2d at 421-422 (moderate preference for 100% vs. 66 2/3%); *cf. Vacationland Broadcasting, supra*, 97 FCC 2d at 495, 497, 55 RR 2d at 1306, 1307 ("slight to moderate," "clear" preference for 96.4% vs. 73%).

9. *Grantham's Exceptions: Motion to Enlarge Issues.* Grantham, the comparative winner and FM selectee below, excepts to the ALJ's ruling, Memorandum Opinion and Order, FCC 83M-3269, released September 20, 1983, denying his May 31, 1983 motion to enlarge issues which had sought the addition of fraudulent billing, non-reporting, and character issues against Leflore-Dixie. Essentially, Grantham seeks a remand of this

[5] Leflore-Dixie also excepts (Br. at 15-20) to the ALJ's ruling, Memorandum Opinion and Order, FCC 84M-109, released January 11, 1984, denying its October 12, 1983 petition to enlarge issues which had sought to probe alleged "inadequacies" in accounting reports filed by Grantham while he was engaged in the interim operation of Stations WSWG/WSWG-FM. *See* note 2, *supra*. The ALJ rejected Leflore-Dixie's allegations as speculative. Our review of the pleadings reveals that: (1) Leflore-Dixie has failed to specifically allege any wrongdoing by Grantham that would require further hearing, and (2) the Commission's Mass Media Bureau, the appropriate forum for review of Grantham's accounting statements in the first instance, has not indicated any dissatisfaction with them. We can find no record basis for second-guessing the Bureau's handling of this matter. *Cf. Leflore-Dixie Employee Venture*, FCC 83R-90, released November 8, 1983 (request made one year after grant that the Board terminate interim operation because of mismanagement dismissed for want of jurisdiction). Therefore, we deny Leflore-Dixie's exception.

proceeding to adduce evidence under these issues which it hopes will lead ultimately to the disqualification of Leflore-Dixie and the award of *both* the AM and the FM facilities to Grantham. We affirm the ALJ's refusal to add the requested issues.

10. First, Grantham's fraudulent billing allegations were not supported by affidavits of persons with first-hand knowledge of the purported violations and did not identify any persons or advertisers to whom fraudulent bills were said to have been issued, the dates, or other particulars. The charges were thus properly rejected as lacking the specificity required by Section 1.229(d) of the Rules, 47 CFR §1.229(d), in order to establish a *prima facie* case.[6] *Compare Post-Newsweek Stations, Florida, Inc.*, 49 FCC 2d 666, 667, 31 RR 2d 1326, 1328-9 (Rev. Bd. 1974) (no issue added where allegations were unspecific and speculative), *with Gilbert Broadcasting Corp.*, 56 FCC 2d 184, 185-186, 35 RR 2d 441, 442-444 (Rev. Bd. 1975) (issue added where supported by affidavit of employee who stated that named principal had instructed her to "fix the affidavits" of performance), *and Country-Politan Broadcasting, Inc.*, 54 FCC 2d 61, 62-63, 34 RR 2d 87, 89-90 (Rev. Bd. 1975) (issue added *sua sponte* where movant supplied affidavit of former employee who averred specifically that principal had instructed him to fraudulently bill). Second, with regard to Leflore-Dixie's admitted failure to report a felony conviction of a former principal, Eddie Galey, for obtaining diet pills by using a forged physician's signature, we concur with the ALJ's finding that there was no nexus shown between Galey's past illegal conduct and the applicant's current qualifications and with his further finding that there was no evidence that the applicant intentionally withheld the conviction information. While Grantham speculates that Leflore-Dixie's principals should have known about the conviction,[7] the latter responded with affidavits specifically denying knowledge of the wrongdoing. Accordingly, addition of the issue was properly denied. *See Merrimack Valley Broadcasting, Inc.*, 57 RR 2d 713, 716 n.9 (1984).

11. Finally, Grantham maintains that, based on the affidavit of one Essex Reed, the ALJ should have added a "character" issue to inquire into alleged alcohol and marijuana consumption by Leflore-Dixie principal

[6] Although not decisional here, we also note that the Commission is currently reviewing its fraudulent billing policies to determine whether continued Commission regulatory oversight in this area is in the public interest. Second Notice of Proposed Rule Making, *Elimination of Unnecessary Broadcast Regulation*, FCC 85-26, released February 5, 1985.

[7] The affidavit of Charles E. White, an employee of the interim operation, relied on by Grantham, merely stated White's "belief" that Leflore-Dixie principals knew of the conviction and averred that the conviction was discussed with unnamed members of the Station WSWG staff, which included some current principals of Leflore-Dixie. Grantham Reply to Opposition to Motion to Enlarge Issues, filed July 29, 1983, Appendix B.

James Brown and others while operating Station WSWG, *see* note 2, *supra.* The ALJ refused to add the issue after finding that Reed's allegations were fully rebutted by affidavits of Brown and Keith Worrell, a Leflore-Dixie principal and former Station WSWG general manager. Brown specifically denied Reed's charges and stated that Reed had been denied entry to the station on several occasions and on one occasion had told Brown "I'll get you for this." Leflore-Dixie Opposition to Motion to Enlarge Issues, filed July 5, 1983, Attachment F. Grantham's reply pleading contained neither a response by Reed to Brown's counter-allegations concerning Reed's reliability nor affidavits corroborating Reed's charges. We affirm the ALJ's denial of the requested issue. The pleadings fail to make out a *prima facie* case of occurrences of drug-alcohol abuse at the station, *see* 47 CFR §1.229(d); furthermore, as we have recently pointed out, allegations involving possible criminal misconduct, particularly relating to the serious matter of drug use, should be resolved initially in a court of competent jurisdiction with all the precise constitutional and statutory protections applicable in criminal proceedings. *Alan K. Levin,* 97 FCC 2d 1, 4-6, 55 RR 2d 981, 983-984 (Rev. Bd. 1984). Here, as in *Levin,* no criminal complaints were lodged with appropriate enforcement authorities, and the exceptor failed to show an associated past broadcast record involving violations of Commission rules or policies or other breaches of the station's public interest obligations. Furthermore, as was the case with the unreported felony conviction discussed in paragraph 10, *supra,* Grantham has made no showing whatsoever that the past behavior referred to has any "predictive value" in ascertaining whether Leflore-Dixie can be relied upon to comply with Commission regulatory laws and precepts in its future operation of a broadcast station. *Id.* Accordingly, we deny Grantham's exception.

12. In sum, we find both Grantham and Leflore-Dixie basically qualified to be licensees. Comparatively, Grantham has a moderate integration preference, *see* paragraph 8, *supra,* and a very slight auxiliary power preference, and neither applicant enjoys a diversification preference, I.D., paras. 51-52. Therefore, Grantham is comparatively superior to Leflore-Dixie. However, because the award of two stations in the same community is at stake in this proceeding and the Commission has traditionally viewed the public interest as being served by diversifying the control of the mass media, *Policy Statement, supra,* 1 FCC 2d at 394-395, 5 RR 2d at 1908-1909, we conclude that grant of the preferred FM facility to Grantham and the AM facility to Leflore-Dixie will best serve the public interest, convenience, and necessity.[8]

[8] As a consequence of this decision, these two acrimonious rivals may need to cooperate with each other since WSWG and WSWG-FM apparently now share some common physical plant. See Leflore-Dixie FCC Forms 301, Section V-B (File Nos. BPH-810223AD

13. ACCORDINGLY, IT IS ORDERED, That the applications of Ronnie J. Grantham (File No. BPH-810511AE) and Leflore-Dixie, Inc. (File No. BP-810312AE) for construction permits for permanent authority to operate Station WSWG-FM and Station WSWG(AM), respectively, at Greenwood, Mississippi ARE GRANTED; that the applications of Leflore-Dixie, Inc. (File No. BPH-810223AD) and Ronnie J. Grantham (File No. BP-810511AR) ARE DENIED; and that the applications of Mid-Delta Broadcasting, Inc. (File Nos. BPH-810511AC and BP-810511AN) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Concurring Statement
of
Board Member Norman B. Blumenthal

The result of the majority *Decision* is correct, but several of its subsidiary conclusions appear infirm.

First, at paragraph 10, *ante,* the majority finds "no nexus" between the felony forgery conviction[1] of a (former) principal of the Leflore-Dixie applicant and that applicant's character qualifications. To prevent comparative "upgrading," the delicts of principals-of-record at the time of application are to be considered. *TV 9, Inc.* v. *FCC,* 495 F.2d 929, 938-940 (D.C. Cir. 1973), *en banc rehearing denied,* 495 F.2d 941 (1974). The majority has heretofore applied the proper rule. *See United Broadcasting Co., Inc.,* 94 FCC 2d 938, 953-955 (Rev. Bd. 1983), *review granted on other grounds,* FCC 84-639, released January 14, 1985 (Comm'n).

Second, at paragraph 11, *ante,* the majority relies, *inter alia,* on *Alan K. Levin,* 97 FCC 2d 1, 4-6 (Rev. Bd. 1984) (applications for Comm'n review pending), for not examining sworn charges of alcohol and drug abuse at the predecessor station (WSWG-AM) by another Leflore-Dixie principal. For reasons more fully set forth in *Levin,* [2] I distance myself from the rationale of my colleagues, *viz.,* that drug abuse has no "predictive value" as to one's qualifications for licenseeship. As in *Levin,* this reasoning seems shamelessly doped-up.

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and BP-810312AE). They are counseled to remember Dr. Franklin's *bon mot:* "We must, indeed, all hang together, or, most assuredly, we shall all hang separately."

[1] The Leflore-Dixie principal was convicted of forging a physician's signature to obtain amphetamines. The applicant should suffer an appropriate comparative demerit.

[2] *See* 97 FCC 2d 1, at 9 (dissenting statement).

FCC 84D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Leflore-Dixie, Inc. Greenwood, Mississippi	MM Docket No. 83-396 File No. BPH-810223AD
Mid-Delta Broadcasting, Inc. Greenwood, Mississippi	MM Docket No. 83-397 File No. BPH-810511AC
Ronnie J. Grantham Greenwood, Mississippi	MM Docket No. 83-398 File No. BPH-810511AE
For Construction Permit for a New FM Station	
Leflore-Dixie, Inc. Greenwood, Mississippi	MM Docket No. 83-400 File No. BP-810312AE
Mid-Delta Broadcasting, Inc. Greenwood, Mississippi	MM Docket No. 83-401 File No. BP-810511AN
Ronnie J. Grantham Greenwood, Mississippi	MM Docket No. 83-402 File No. BP-810511AR
For Construction Permit for a New AM Station	

Appearances

FORBES W. BLAIR, ON BEHALF OF LEFLORE-DIXIE, INC.; *CURTIS T. WHITE, MARY BROONER,* AND *DENNIS P. CORBETT* AND *STEVEN A. LERMAN* ON BEHALF OF RONNIE J. GRANTHAM; AND *BRIAN KILBANE* ON BEHALF OF THE MASS MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: August 17, 1984, Released: August 22, 1984

Preliminary Statement

1. This case involves mutually exclusive applications for construction permits for new AM and FM broadcast stations in Greenwood, Mississippi filed by Ronnie J. Grantham (Grantham), Leflore-Dixie, Inc. (Leflore), and Mid-Delta Broadcasting, Inc. (Mid-Delta). The proceeding was designated for evidentiary hearing by an Order of the Chief, Mass Media Bureau, released April 22, 1983.[1] The designation order specified two issues for hearing.

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

Subsequently, by *Memorandum Opinion and Order,* FCC 83M-3249, released September 19, 1983, the Presiding Judge specified two additional issues:

> To determine whether Mid-Delta Broadcasting, Inc. was lacking in candor or misrepresented facts or information regarding the availability of its proposed transmitter site and, if so, the effect thereof upon the applicant's basic or comparative qualifications.
>
> To determine whether Mid-Delta Broadcasting, Inc. was lacking in candor or misrepresented facts regarding its submission of a March 12, 1982 amendment without the signature of a Mid-Delta officer and the supplement filed April 2, 1982.

The burden of proceeding on the latter two issues was placed on Grantham and the burden of proof on these issues was placed on Mid-Delta.

2. A prehearing conference was convened on July 7, 1983. Hearing sessions were held on October 7, 1983 and during October 11-14, 1983. The record was closed by Order (FCC 84M-216) released January 16, 1984.[2] Proposed findings of fact and conclusions were filed by the parties on December 2, 1983 and reply findings were filed by the parties on December 16, 1983.

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[1] At the time of designation, East Delta Communications, Inc. was also an applicant for the FM station construction permit. East Delta's application was dismissed by the Presiding Judge's *Order,* FCC 83M-4361, released November 25, 1983.

[2] The record was kept open due to the filing of a petition to enlarge issues by Leflore on October 12, 1983 and in order to permit Leflore and Mid-Delta to file certain supplementary information.

Findings of Fact

Qualification Issues

Site Availability Representations

3. This issue seeks to determine whether Mid-Delta was lacking in candor or misrepresented facts or information regarding the availability of its transmitter site. On May 11, 1981, Mid-Delta submitted with its AM and FM application a copy of an April 18, 1981, letter from Mid-Delta principal, Harry Hughes to James C. Tyler, employee of Charles Saunders, owner of the facilities of WSWG and WSWG-FM in Greenwood, Mississippi and former sole shareholder of the licensees of those stations (Grantham Ex. 3; Tr. 355). The April 18 letter purported to confirm an understanding that Saunders had conveyed to Tyler that he (Saunders) would consider a leasing agreement of the facilities of WSWG AM-FM facilities at such time as a license was granted to Mid-Delta (Grantham Ex. 3).

4. On April 23, 1981, Tyler sent a "return receipt requested" letter to Hughes in care of Mid-Delta's attorney in Greenwood, Luke Schissell. Tyler stated that he had previously made clear to Hughes that Saunders would not be willing to give Mid-Delta a letter concerning the availability of a lease arrangement for the WSWG AM-FM facilities since this "would perhaps constitute a lease option that does not exist and which should not be implied by the so-called 'confirmation letter' of our conversation." In the April 23 letter, Tyler stated that during the conversation referenced in the April 18 letter, he was giving his personal opinion and had no authority to speak as Saunders' power of attorney (Grantham Ex. 4, p. 3). Tyler sent both the April 18 and April 23, 1981, letters to the FCC (Grantham Ex. 4).

5. Mid-Delta did not include or make mention of the April 23, 1981 letter at the time of the May 11, 1981 filing of its application, although it did include the April 18, 1981 letter (Tr. 355). The purpose of filing the April 18 letter was to demonstrate that Mid-Delta had reasonable assurance of the availability of a transmitter site (Tr. 358, 454). Hughes wrote the April 18 letter after meeting with Tyler on April 15, 1981 to confirm what Tyler had supposedly told him (Tr. 368). Hughes "just felt it would be good to have something in writing of our conversation on that particular date" (Tr. 369).

6. Hughes became aware of the April 23, 1981 letter after Schissell brought it to his attention on April 24, 1981. Hughes does not dispute the accuracy of the April 23 letter setting forth Tyler's version of the April 15 meeting (Tr. 387). Hughes asserted that the April 23 letter was consistent with his verbal understanding with Tyler that Saunders would lease the station facilities to Mid-Delta (Tr. 374-376). He interpreted the letter as

simply saying that Saunders would not give Mid-Delta "a letter" to that effect (Tr. 373, 376). Hughes agreed that only Saunders could give a lease and that Tyler could not (Tr. 376, 377). He conceded that there was nothing in Tyler's April 23 letter to confirm the understanding recited in the April 18 letter (Tr. 378). Hughes stated he did not file the April 23 letter with the Mid-Delta application because he did not see anything in it which was inconsistent with the earlier letter of April 18 (Tr. 378, 379). Hughes stated he was not concerned with the language in the April 23 letter in light of his verbal understanding with Tyler that Saunders would be willing to dispose of the facilities (Tr. 380). The decision not to file the April 23 letter with the Mid-Delta application was made by Hughes and Schissell, who was initially a part of the Mid-Delta group (Tr. 381). Mid-Delta principals, Alix Saunders and Lee Frison, did not see the April 23 letter prior to the filing of Mid-Delta's application.

Certification Page/Supplement Representations

7. This issue seeks to determine whether Mid-Delta was lacking in candor or misrepresented facts regarding its submission of a March 12, 1982 amendment without the signature of a Mid-Delta officer and the supplement filed April 2, 1982. On March 12, 1982, the FM "B" cut-off date in this proceeding, Mid-Delta filed a petition for leave to amend and an amendment to its FM application changing its ownership structure and its integration proposal (Grantham Ex. 6).[3] The filing was transmitted to the Commission "through counsel" by means of a letter from counsel. *Id.* at 1. The filing did not contain a certification page signed by an officer of Mid-Delta. No indication was given in the filing that a certification page would be filed at a later date. Also, on March 12, 1982, Mid-Delta filed with the Commission a petition for leave to amend and an amendment to its AM application attempting to upgrade its integration proposal (Grantham Ex. 7).[4] As in the case of the FM amendment, the AM filing was transmitted by counsel and did not contain a certification page signed by an officer of Mid-Delta.

8. Prior to the March 12 filings, all amendments filed by Mid-Delta had also been submitted by counsel and did not contain a certification page signed by an officer of Mid-Delta (Grantham Exs. 11-14). These amendments consisted of the following: a May 12, 1981 amendment to the AM application to correct errors in that application;[5] a May 15, 1981 amendment to the AM application to correct an error in that application; a

[3] The amendment was 42 pages in length and attempted, *inter alia*, to upgrade Mid-Delta's integration proposal (Grantham Ex. 6, pp. 9-11).

[4] The AM "B" cut-off date in this proceeding is June 26, 1981.

[5] Mid-Delta filed its AM and FM applications with the Commission on May 11, 1981 (Grantham Ex. 11, p. 1).

June 26, 1981 amendment to the AM application which, *inter alia,* changed Mid-Delta's integration proposal; and an August 14, 1981 amendment to its AM application which attempted, *inter alia,* to "finalize" the integration proposal of former Mid-Delta stockholder C.A. Boykins.

9. On March 22, 1982, Grantham filed with the Commission oppositions to Mid-Delta's March 12, 1982 petitions for leave to amend, pointing out that Mid Delta's March 12, 1982 AM and FM filings did not contain certification pages. (See Tr. 411-14, 680-81). Grantham asked that the filings be dismissed as violative of Commission Rule 73.3513. On April 2, 1982, Mid Delta filed with the Commission a "Supplement to Petition for Leave to Amend" in which Mid Delta alleged that a certification page for the FM application had been signed by Mid Delta officer Alix H. Sanders on March 12, 1982, but that "because of *delays in the mail,* the original of the corporate officer's certification was not included." (Grantham Ex. 8, p. 2) (emphasis added). The April 2, 1982 "Supplement" contained a certification page bearing a date of March 12, 1982 and the signature of Sanders. *Id.* at 4. No "supplement" containing a certification page was ever filed in connection with Mid Delta's March 12, 1982 AM application.

10. The Designation Order released April 22, 1983 rejected Mid-Delta's March 12, 1982 AM and FM amendments. The AM amendment was rejected because it was filed subsequent to the AM cut-off date (June 26, 1981). The FM amendment was rejected because it was not filed in compliance with Section 73.3513(a)(3) of the Rules since it was not signed by an officer of Mid-Delta (paragraph 3). On April 29, 1983, Mid-Delta filed with the Commission an Application for Review of the Hearing Designation Order. Mid-Delta asserted therein that the corporate officer's certification was not included with the March 12, 1982 amendment because of "delays in the mail" (para. 2). By *Order* released May 5, 1983 (FCC 83I-46), the Commission dismissed Mid-Delta's pleading subject to being refiled with the Presiding Judge. On May 10, 1983, Mid-Delta filed with the Presiding Judge an "Application For Certification Of Review." Mid-Delta reiterated therein that the corporate officer's certification was not included with the March 12, 1982 amendment because of "delays in the mail" (para. 2). By *Order,* released September 15, 1983 (FCC 83M-3195), Mid-Delta's application for certification was denied. On June 10, 1983, Mid-Delta submitted an affidavit of Alix Sanders as part of an opposition to Grantham's motion to enlarge issues in this proceeding (Grantham Ex. 9). In his affidavit, Sanders stated that he signed the FM amendment certification "on the date of March 12, 1982 and mailed same back to [Washington] counsel's offices" and that he understood that "counsel subsequently filed [the certification page] with the F.C.C. upon

receipt in his offices and, further, that such document was appreently [sic] *delayed while being sent in the mail." Id.* (emphasis added).

11. On March 10, 1982, the principals of Mid-Delta and Washington, D.C. counsel participated in a conference call lasting approximately one hour (Mid-Delta Exs. 10, 11A; Tr. 400, 404). During the conference call, the withdrawal of Mid-Delta principals Dr. Boykins and Dr. Carter was finalized (Tr. 398). At the end of the conference call, Washington, D.C. counsel was instructed to prepare the necessary papers (Tr. 402-403).[6] Washington, D.C. counsel prepared the petition for leave to amend and the AM and FM amendments and mailed the material by express mail to Sanders in Greenwood, Mississippi on the evening of March 10, 1982 or the morning of March 11, 1982. Sanders received the material on March 12, 1982 (Tr. 646, 649, 652-653, 660-663, 664).[7]

12. Sanders claims that the material included one form for his signature which was to be returned to Washington, D.C. counsel's office (Tr. 661-662). Sanders identified the certification page submitted with the April 2, 1982 "Supplement" (Grantham Ex. 8, p. 4) as the form which he signed on March 12 (Tr. 664). Sanders has no recollection of receiving a similar form for the AM amendment (Tr. 664-667). As noted, *supra,* no certification page was filed for the AM amendment. Sanders' claim of receiving a certification page for the March 12 FM amendment runs counter to Mid-Delta's practice followed consistently since the filing of its AM and FM applications, of submitting amendments without certification pages. Significantly none of Mid-Delta's principals are familiar with the Commission's certification requirements and the need for a certification page was not discussed prior to the filing of the March 12 amendment (Tr. 446, 497, 499, 509-510, 513, 518, 522, 669, 680).

13. Hughes claims that he witnessed Sanders' signing of the certification page and that he was "pretty much sure" that the signing took place on March 12, 1982 (Tr. 419-421). However, Hughes' testimony is untrustworthy and will not be credited. Hughes' claim is inconsistent with his earlier testimony that he did not see the March 12, 1982 certification page on or about March 12, 1982 (Tr. 409) and that he was not present at the time Sanders signed the certification page (Tr. 418). Hughes also gave inconsistent and contradictory testimony on other important matters. Hughes initially claimed that he was aware of the Commission's certification requirements from the time Mid-Delta filed its applications in May 1981 because counsel had explained those requirements to him. He

[6] Mid-Delta followed the same routine in the preparation and filing of all amendments prior to March 12, 1982 (Tr. 423).

[7] As noted in paragraph 7, *supra,* on March 12, 1982 counsel for Mid-Delta filed with the Commission Mid-Delta's petitions for leave to amend and amendments to its FM and AM applications without certification pages.

further claimed that he had personally witnessed Sanders sign certification pages for Mid-Delta amendments on many occasions prior to March 12, 1982 (Tr. 408, 410). Both statements were not true. It was stipulated at the hearing that none of Mid-Delta's amendments prior to March 12, 1982 contained certification pages (Tr. 441). Following this stipulation, Hughes controverted his earlier testimony and conceded that he in fact had no knowledge of the Commission's requirements concerning the certification of amendments (Tr. 446, 447). Also, Hughes asserted that Sanders prepared the March 12, 1982 amendment on the basis of the March 10, 1982 conference call (Tr. 403). Sanders later testified, however, that Mid-Delta's counsel prepared the amendment on the basis of that conference call (Tr. 402-403). Mid-Delta presented no evidence to corroborate Hughes' testimony that he was present at the signing of the certification page. In this connection, Sanders offered no testimony on Hughes' presence at the signing.

14. Mid-Delta has repeatedly represented[8] that the FM certification page was not timely filed "because of delays in the mail." However, Sanders' testimony establishes these representations were false. Sanders states that after signing the certification page on March 12, he gave it to a secretary and instructed her to mail the document to his Washington D.C. counsel (Tr. 682-683). Sanders further states he subsequently received a telephone call from his Washington D.C. counsel informing him that the signed certification page had not been received in Washington (Tr. 683). Although Sanders does not recall the exact date of counsel's telephone call (Tr. 688), his counsel's records reflect telephone calls to Mid-Delta's principals on March 19 and March 29, 1982 (Mid-Delta Ex. 13). Sanders was out of his office at the time of the call and immediately telephoned his Greenwood law office and instructed his secretary to find the certification page and send it by an express mail service to Washington (Tr. 683). Sanders was aware of the urgency of transmitting the document to his counsel as quickly as possible (Tr. 684-685). According to Sanders, the certification page was found by his secretary and sent by an express mail service to Washington (Tr. 683). Sanders' records indicate that the certification page was sent to Washington on March 30, 1982 (Tr. 681, 684). Sanders testified that he had confirmed the March 30, 1982 express delivery date during a telephone conversation with his office on October 12, 1983, the day before his cross-examination on this issue (Tr. 689). Sanders stated that while he had forgotten the date the certification page had been sent to Washington, he had not forgotten that the document had been sent by an express delivery service (Tr. 689-690). Sanders testified that on all the occasions where Mid-Delta represented to the Commission that the certification page had been "delayed in the mails," including his

[8] See paragraphs 9 and 10, *supra.*

June 10, 1983 affidavit, he took no steps to determine whether that representation was accurate or not (Tr. 694, 698-700). Sanders asserts that prior to October 12, 1983, he honestly believed his instructions given on March 12, 1982 had been carried out and that the certification page had been lost in the mail (Tr. 700-702). Sanders' explanation is not believable since by his own account, he knew in mid or the latter part of March 1982 that the certification page had not been mailed and, in fact, had instructed his secretary to find the document and send it by express mail to Washington.

Comparative Issue

Leflore-Dixie, Inc.

15. Leflore, a Mississippi corporation, consists of the following stockholders, officers and directors (Leflore Ex. 1, Tr. 32):

Name	*Office Held*	*Percentage of Ownership*[9]
Keith Worrell, Jr. Greenwood, MS	President, Director	44
Hardin Browning Greenwood, MS	Vice-President, Director	8
Alice C. Worrell Greenwood, MS	Secretary/Treasurer Director	8
Anthony Paul Browning Greenwood, MS	–	8
James Brown Greenwood, MS	Director	8
David Browning Greenwood, MS	–	8
Susan M. Mansfield Holcomb, MS	Director	8

Neither Leflore nor any of its principals, has any ownership interest or office in any radio station, television stations, newspaper, cable system, or other medium of mass communication in Greenwood or elsewhere.[10]

16. Keith Worrell, Jr. will be the full-time General Manager of the stations. He will supervise the stations' entire operation, with all

[9] The other 8% was held by Eddie Galey who voluntarily withdrew from Leflore after the B cut-off dates in this proceeding.

[10] Keith Worrell held the title of Vice-President and Director of Triple X Broadcasting, Inc., the licensee of WXXX, Hattiesburg, Mississippi during the period 1979-1981. He had no ownership interest in that station and there is no evidence of record that Worrell functioned as an officer and director or otherwise played a significant management role at WXXX after the cut-off date for either the AM application (June 26, 1981) or the FM application (March 12, 1981).

department heads reporting directly to him (Leflore Ex. 2, p. 4). Worrell has lived in Greenwood, Mississippi since 1964, and he worked at stations WSWG and WSWG-FM in Greenwood as chief engineer from 1965-1976 and as manager and chief engineer at those stations from 1976-1980 (Leflore Ex. 2, pp. 1-2). He has participated in several civic activities. He has been a member of the advisory board of the local Salvation Army (1981 to the present) (Leflore Ex. 2, p. 3; Tr. 185); carried information packets to and solicited donations from local businesses during the 1982 local United Way campaign (*id.*); functioned as an emergency communications operator with the Leflore County Civic Defense (1979 to the present) (Leflore Ex. 2, p. 3; Tr. 188-89); functioned as a visitors guide on a train at an annual Crop Day in Greenwood (Tr. 190); been a dues-paying member of the Leflore County Farm Bureau (1965 to present) (Leflore Ex. 2, p. 3; Tr. 190-91); and met once a year on the craft committee of Mississippi Delta Junior College (Tr. 192); among other things (Leflore Ex. 2, p. 2; Tr. 193-97).

17. Hardin Browning will be the full-time Program Director of the proposed stations. As program director, he will be on 24-hour call. He will be responsible for the stations' total on-air sound, with programming input from all of the employees. He will regularly coordinate with the Public Affairs and Public Service Directors to insure the maximum possible service to the community. He will keep abreast of EEO standards and FCC practices regarding programming. He will oversee political and promotional type programming to insure compliance with good practice (Leflore Ex. 3, p. 3; Tr. 286, 287).

18. Hardin Browning has lived in Greenwood since 1971 (Leflore Ex. 3, p. 1). Between 1965 and 1971 he worked as an announcer at six different radio stations (Leflore Ex. 3, Att. A). For less than a year, during 1971-72, he was an announcer/engineer at a television station in Greenwood. *Id.* From 1972 to 1980, he was program director at WSWG and WSWG-FM in Greenwood. *Id.* He is a member of a Baptist Church in Greenwood and served as a Sunday school teacher for three years, assistant Sunday school teacher one year, and assistant music director for four years. He has participated in Lay Ministers Day Programs and the Jail Ministry Program. In 1982 and 1983, he was an assistant coach of some youth sports teams in Greenwood (Leflore Ex. 3, pp. 2-3).

19. Anthony Paul Browning will be the full-time Sales Manager of the stations (Leflore Ex. 5, p. 5). As such, he will perform supervisory responsibilities as he will be in charge of employees at the station handling sales accounts. As the sales manager, he will perform some copywriting duties and will personally do some selling (Tr. 294-298). Anthony Browning was born in Grenada, Mississippi on June 20, 1947 and moved to Greenwood at approximately three years of age (Leflore Ex. 5,

p. 1). He is the brother of Leflore principal David Browning (Leflore Ex. 5, p. 1). In August 1975, Anthony Browning began working at WABG-TV as a salesman and copywriter, in addition to an early morning local news assignment. Anthony Browning joined the staff of WSWG and WSWG-FM in September 1976 as the sales manager and remained there until 1982.[11] Browning currently works at station WGRM, but will resign that position if Leflore's applications are granted (Leflore Ex. 5, p. 5). Browning is currently a member of the Bankston School PTA, the Greenwood-Leflore County Chamber of Commerce, the Dixie Peewee Girls Softball Association and the Leflore County Hunting and Fishing Association. He formerly participated in the Boy Scouts, the Greenwood Jaycees and the Exchange Club. Browning has performed volunteer service for the Leflore County Heart Association, the Leflore County Cancer Society and the Mississippi Firefighters Memorial Burn Association (Leflore Ex. 5, Att. A). He is a member of the Mt. Pisgah Baptist Church, and served as a Sunday school teacher from 1980 - October 1981 (Leflore Ex. 5, p. 5; Tr. 291).

20. Alice C. Worrell will perform "bookkeeping/accounting" functions forty hours a week at the station (Leflore Ex. 1, p. 2). She "will be responsible for the day to day activities of the office, keep a complete and accurate set of books, keep up to date on FCC Rules and Regulations, and work with the station's General Manager to insure the Public Inspection File contains the correct material." (Leflore Ex. 4, p. 3). Ms. Worrell, the wife of Leflore principal Keith Worrell, Jr., was born in Carrollton, Mississippi on October 9, 1942. Carrollton is approximately 15 miles from Greenwood (Leflore Ex. 4, p. 1). Ms. Worrell has lived in Greenwood since at least 1964. From May, 1966 until June of 1969, Ms. Worrell served as a bookkeeper and traffic manager of WSWG-FM (Leflore Ex. 4, p. 2). From June 1969 to July 1972, she served as a junior accountant with the Greenwood accounting firm of Taylor, Powell, Wilson & Hartford (Leflore Ex. 4, p. 2). After taking three years off work to be with her children, Ms. Worrell served as the office manager and accountant for Three Rivers Ford, Inc. in Greenwood from August 1975 until July 1979 (Leflore Ex. 4, p. 2). Ms. Worrell became a housewife again in July of 1979 (Leflore Ex. 4, p. 2). Ms. Worrell is a member of the Mt. Pisgah Baptist Church, and has served as a substitute Sunday School teacher for the last two years (Leflore Ex. 4, p. 3).

21. James Brown, who is Black, will work full-time as an announcer for the proposed stations (Leflore Ex. 6, p. 2). Brown was born in Greenwood, Mississippi on February 24, 1951 and has lived in Greenwood all his life, except for the period of time he was attending Coahoma Junior

[11] Leflore can only receive broadcast experience credit through July 1980 when the interim operation was activated.

College in Clarksdale, Mississippi and Mississippi Valley State University (Leflore Ex. 6, p. 1). In 1971 Brown began working at WSWG as an announcer. This position continued until 1978, when Brown became an assistant manager for the Record Gallery in Greenwood, Mississippi (Leflore Ex. 6, p. 1). For the first eight months of 1980, Brown was in an engineer training program with Mississippi E.T.V. at Inverness, Mississippi (Leflore Ex. 6, p. 1). Brown has been a member of the following organizations: Springhill Baptist Church, Browning Civic League; East Elementary PTA; New Progress Masonic Lodge No. 217. Brown has performed volunteer work for the following organizations: Amanda Elzy High School and Mississippi Valley State University (Leflore Ex. 6, p. 1).

22. David Browning will be employed 40 hours per week as an announcer at the stations (Leflore Ex. 7, p. 2). Browning was born in Jackson, Mississippi on February 22, 1959 and moved to Greenwood in 1964, and continues to reside there. He is the brother of Leflore principal Anthony Browning (Leflore Ex. 7, p. 1). Browning began working at WABG radio as an announcer in January 1978 (Leflore Ex. 7, p. 1). His tenure at WABG lasted four months, at which time he joined the staff of WSWG and WSWG-FM as an announcer. Browning left WSWG after six months and began working for Leflore Communications, installing two-way radios. After working for Leflore Communications for eight months (October 1978 until June 1979), Browning returned to WSWG and resumed his announcing duties (Leflore Ex. 7, p. 1). Browning has been a member of the Junior Civitan Club and the Greenwood Jaycees. He has performed services for the Kiwanis Club and Leflore County Heart Association. Browning is also a member of the Mt. Pisgah Baptist Church, where he has served previously as an assistant Song Director. Browning is currently a student at Mississippi Delta Junior College, where he is studying pre-law (Leflore Ex. 7, p. 2).

23. Susan Maxey Mansfield will be in charge of "traffic" and will work forty hours a week (Leflore Ex. 1, p. 2). She describes her duties in this regard as being "responsible for the stations [sic] program scheduling." "[I]t will be my job to insure smooth continuity of programming." She will also transcribe information from telephone call-ins for air use (Leflore Ex. 8, p. 2).[12] Ms. Mansfield was born on September 18, 1951 in Grenada, Mississippi, and lives in Holcomb, Mississippi, approximately 35 miles outside of Greenwood. She has lived in Holcomb all her life (Leflore Ex. 8, p. 1).

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[12] Ms. Mansfield also had previously worked as "Traffic Director" at WSWG and WSWG-FM. "Some of my duties were answering the phone, preparing program logs, billing and accounts receivable, and payroll. I also took down public service announcements and prepared them for the air. I worked with the program director in scheduling commercials and programs." Leflore Ex. 8, p. 2.

24. Leflore proposes to borrow an emergency power generator from the Leflore County Civil Defense (Tr. 176). Keith Worrell stated at hearing that Leflore for many years has had a verbal agreement to this effect with Linda Perkins, the Director of Leflore County Civil Defense (Tr. 178). According to Worrell, this verbal agreement was "confirmed" in a letter from Ms. Perkins to Worrell dated September 27, 1983 (Tr. 177-78). If there was an "extreme" power outage in Greenwood or a power outrage in a "critical" area, such as a hospital, the generator would be removed from the stations by its owner, the Leflore County Civil Defense, and used for purposes other than keeping the stations on the air (Tr. 267-68). According to the testimony of Alix H. Sanders, the Leflore County Civil Defense Council has never been asked to approve Ms. Perkins' commitment to Worrell, and has not done so (Tr. 537). Sanders also testified that the Leflore County Civil Defense Council does not presently have in stock an emergency generator of the type Ms. Perkins has promised to loan Leflore (Tr. 537).

Mid-Delta Broadcasting, Inc.

25. Mid-Delta, a Mississippi corporation, consists of the following stockholders, officers and directors (Mid-Delta Ex. 6):

Stockholder	*Percentage of*[13] *Ownership*	*Office*
Alix H. Sanders	20%	President and Chairman of the Board
Lee A. Frison	20%	Director
Henry W. Hughes	20%	Secretary/Treasurer and Director

No officer, director of shareholder has any ownership interest in any media of mass communications (Mid-Delta Ex. 6).

26. Alix Sanders, who is Black, proposes to work a minimum of 30 hours as General Counsel of the stations, and claims that he will scale down his participation in the law practice to 20 hours a week to enable him to keep his commitment (Mid-Delta Ex. 7, pp. 2, 3). The staff proposal of Mid-Delta does not include a general counsel and the salary of Sanders has never been discussed. In point of fact, Mid-Delta and its station staff will rely upon counsel specializing in communications law for questions involving the FCC Rules and Regulations (Tr. 571, 572, 574). The duties of Sanders as general counsel are not clear. He will "review contracts" involving the purchase of equipment and will from time-to-time make

[13] Two other individuals, Michael Carter and E. A. Boykins, each had subscribed initially to 20% Mid-Delta's stock. Carter and Boykins have rescinded their subscription agreements and Mid-Delta has agreed they should be given no consideration in this proceeding (Tr. 311-312).

contractual arrangements with advertisers and service people (Tr. 581, 582). The record does not support a finding that Sanders will devote 30 hours a week as General Counsel. Mid-Delta's offer of proof[14] indicates that Sanders is going to devote a minimum of 40 hours per week to the responsibilities of Public Affairs Director (Mid-Delta Ex. 2 [rejected] and makes no mention of General Counsel. Sanders testified his true intention was to be the Public Affairs Director and that he would devote only a small portion of time as General Counsel. He conceded that he might devote substantially less than 20 hours a week in that role (Tr. 604-607). Sanders does not anticipate supervising other station personnel in his capacity as General Counsel (Tr. 777).

27. Sanders was born in Greenwood, Mississippi and has resided there since 1975. He received his B. A. degree from Jackson State University and his law degree from the University of Mississippi Law School. Since then he has engaged in the practice of law, and also owns a coin-operated laundry. He is a member of the NAACP, the Greenwood-Leflore County Voters League (Board member 1975 to date), the TurnerChapel AME Church, and the PTA. He was elected to the position of Supervisor for Leflore County in 1979 and plans to run again. He will resign his position if Mid-Delta is awarded the grant (Mid-Delta Ex. 7, Tr. 581).

28. Henry W. Hughes proposes to serve as general manager of the proposed stations on a full-time basis if Mid-Delta receives the grant. Hughes was born in Virginia in 1923, received his B.S. degree from Lynchburg in 1949, and has resided in Greenwood since August of 1973 (Mid-Delta Ex. 8, pp. 1, 3). Hughes is currently a car salesman and has not been in broadcasting for the past five years (Mid-Delta Ex. 8, p. 2; Tr. 325). He was a salesman and manager of WKOD in Lynchburg, Virginia (1952-56); general manager of WOLO-TV in Columbia, South Carolina (1966-1973); and general manager of WABG Radio and Television in Greenwood, Mississippi (1973-1978). Hughes is currently a member of the Lions Club, Retail Merchants Association, Greenwood Country Club, Elks Club, (Tr. 346) and Greenwood Chamber of Commerce. Over five years ago, he served as a Director of the American Red Cross. In 1977, he served as a Director of the Mississippi Broadcasters Association (Mid-Delta Ex. 8, p. 2), but is no longer a member of that association (Tr. 347).

29. Lee A. Frison, who is Black, proposes to work thirty hours a week and hold the title of Business Manager (Mid-Delta Ex. 9, p. 2). He does not expect to have a staff working for him (Tr. 478), but he expects that he will receive some secretarial help in the performance of his duties (Tr. 526, 530-31). He will personally handle the station's bookkeeping and accounting (Tr. 526-27). He resided in Itta Bena, Mississippi, which is within the

[14] Mid-Delta's offer of proof is based on its proposed March 12, 1982 amendment to its FM application which was rejected. See paragraph 10, *supra.*

proposed station's service area, from 1959-1963, from September 1966 until 1967, and from February 1977 until December 1982, and he proposes to move to Greenwood if Mid-Delta receives a grant (Mid-Delta Ex. 9, p. 1). He was a member of a chapter of the NAACP within the proposed service area from 1977-82 (Tr. 478).

30. Mid-Delta proposes to install an auxiliary power generator at the station (Mid-Delta Ex. 1, p. 2).

Ronnie J. Grantham

31. Ronnie J. Grantham is a sole proprietor (100% owner). Grantham has no interests in other media of mass communications (Grantham Ex. 1, p. 1, 4).

32. Grantham will work full-time (a minimum of 40 hours per week) as General Manager. He will make all major policy decisions and supervise all aspects of station operations, including but not limited to programming, sales, and personnel (Grantham Ex. 1, p. 4).

33. Grantham has resided in Greenwood, Mississippi since the summer of 1981 and will continue to reside in Greenwood if he is awarded the FM or AM construction permit for which he has applied. Grantham also resided in Greenwood from January-August 1964, while he was working at WLEF in Greenwood (Grantham Ex. 1, p. 2, 3). From February 1963-January 1964, Grantham worked full-time as a staff announcer at WHOC, Philadelphia, Mississippi. From January 1964-August 1964, he worked full-time as a staff announcer at WLEF, Greenwood, Mississippi. From September 1964-October 1964, he worked full-time as chief engineer and staff announcer at WTUP in Tupelo, Mississippi. From October 1964-August 1966, he worked full-time as a staff announcer and music director at WRBC, Jackson, Mississippi. From August 1966-October 1966, Grantham worked full-time as a staff announcer and engineer at KOMA in Oklahoma City, Oklahoma. From October 1967-August 1968, he worked 30-40 hours a week as program director and staff announcer at KBGO, Waco, Texas. From September 1968-May 1971, he worked full-time as a staff announcer and music director at WQAM, Miami, Florida. From May 1971-January 1973, he worked full-time as a production director and staff announcer at WWDJ, Hackensack, New Jersey. From January 1973-July 1973, Grantham worked full-time as a staff announcer and assistant program director at WMYQ-FM, Miami, Florida. From July 1973-February 1974, he worked full-time as a staff announcer and operations manager at WHYI-FM, Fort Lauderdale, Florida. *Id.* From June 1974-December 1974, he worked full-time as operations manager of WZZQ-FM and WJDX and staff announcer at WJDX, Jackson, Mississippi (Grantham Ex. 1, p. 1-2); Grantham currently serves as co-chairman of the Beautification Committee of the Greenwood Chamber of Commerce. He is also

currently talent coordinator for the Greater Greenwood Foundation for the Arts (Grantham Ex. 1, p. 3).

34. In the event of a grant of one or both of Grantham's applications, he will install an auxiliary power generator at the station(s) (Grantham Ex. 2).

Conclusions

Qualification Issues

Site Availability Representations

35. This issue seeks a determination whether Mid-Delta was lacking in candor or misrepresented facts or information regarding the availability of its transmitter site. Mid-Delta submitted with its applications a copy of an April 18, 1981 letter from Mid-Delta principal, Harry Hughes to James C. Tyler, employee of Charles Saunders, who owned the facilities of WSWG and WSWG-FM in Greenwood, Mississippi. The April 18 letter purported to confirm an understanding that Saunders had conveyed to Tyler that he (Saunders) would consider a leasing agreement of these facilities at such time as a lease was granted to Mid-Delta. The purpose of the letter was to demonstrate that Mid-Delta had reasonable assurance of the availability of a transmitter site. However, Mid-Delta did not include or make mention of an April 23 letter from Tyler to Hughes. That letter confirmed that at their April 15 meeting, Tyler made clear to Hughes that Saunders would not be willing to give Mid-Delta a "confirmation" letter because that might constitute a lease option which did not exist and which should not be implied by Hughes' April 18 letter. Hughes' decision not to include the April 23 letter was based upon his belief that the April 23 letter was consistent with his verbal understanding, as expressed in his April 18 letter. Hughes also relied upon his discussion with Luke Schissal, an attorney, who at the time was a member of the Mid-Delta group. It can be argued, in retrospect, that Hughes should have included the April 23 letter. Inclusion of that letter would have removed all doubt, real or imagined, as to the parameters of the understanding reached between Hughes and Tyler. However, the failure to include the April 23 letter does not warrant the disqualification of Mid-Delta or even the imposition of a comparative demerit. There is no evidence that Hughes withheld the April 23 letter because of a desire to deceive the Commission concerning the availability of Mid-Delta's transmitter site. The April 18 and April 23 letters are not inconsistent. The April 23 letter discloses that Mid-Delta did not have an option to lease Saunders' facilities. The April 18 letter made no such claim. The April 18 letter merely said that Saunders would consider leasing his facilities to Mid-Delta in the event Mid-Delta received the license. The April 23 letter did not conflict with this understanding. Further, Grantham, who had the burden of proceeding, did not introduce

evidence from Tyler or Saunders controverting Hughes' understanding. Therefore, the issue is resolved in favor of Mid-Delta.

Certificate Page/Supplement Representation

36. This issue seeks to determine whether Mid-Delta was lacking in candor or misrepresented facts regarding its submission of a March 12, 1982 amendment without the signature of a Mid-Delta officer and the supplement filed April 2, 1982. The findings establish that Mid-Delta and its principals misrepresented facts and/or was lacking in candor in (a) claiming in documents filed with the Commission and at the hearing that the FM certification page was signed on March 12, 1982; (b) in repeatedly representing that the FM certification page was not timely filed because of "delays in the mail" and (c) in falsely testifying that prior to October 12, 1983, Sanders honestly believed that the certification page had been lost in the mail.

37. Mid-Delta's claim that Sanders signed the FM certification on March 12, 1982 is based solely on the testimony of Mid-Delta principals, Hughes and Sanders. Ample evidence in this case undermines the credibility of both witnesses. Hughes testimony contains multiple inconsistencies and contradictions and can not be credited. See paragraph 13, *supra.* Significantly, Sanders said nothing about Hughes' presence at the time of signing. Sanders' testimony is no more trustworthy than Hughes. The credibility of Hughes is destroyed by his repeated misrepresentations that the FM certification page was not timely filed because of "delays in the mail" and by his unbelievable assertion that prior to the hearing he believed that the document had been lost in the mail, *discussed, infra.* Sanders' credibility is further eroded by his admission as well as that of the other Mid-Delta principals, that he was not familiar with the Commission's certification page requirements and that the need for a certification page was not even discussed prior to the filing of the March 12 amendment.

38. In contrast to the untrustworthy testimony of Mid-Delta's principals, every piece of available extrinsic evidence points directly to the conclusion that the certification page was *not* signed on March 12, 1982. First, the evidence shows that by the time of its March 12, 1982 filings, Mid-Delta had established a clear routine in its submission of "amendments" to its application. All three of the Mid-Delta principals testified that they were routinely consulted when Mid-Delta amendments were to be filed. On four separate occasions – May 12, 1981, May 15, 1981, June 26, 1981, and August 14, 1981 – Mid-Delta attempted to amend its applications. In each instance, it failed to submit a certification page signed by an officer of Mid-Delta. Instead, the amendments were transmitted to the Commission through counsel. Significantly, two of

these earlier amendments, those filed on June 26, 1981 and August 14, 1981 were quite similar in form and content to the March 12, 1982 amendments, and attempted, *inter alia,* to change Mid-Delta's integration proposal. The June 26, 1981 amendment was submitted on the AM "B" cut-off date, just as the March 12, 1982 amendments were submitted on the FM "B" cut-off date. Mid-Delta had thus established a pattern of filing important substantive amendments *without certification pages.*

39. When Mid-Delta filed its purported amendments on March 12, 1982, it followed its established routine in every key detail. The Mid-Delta principals were consulted in accordance with the routine, and the amendments were filed "through counsel" without certification pages. The amendments paralleled the earlier amendments in format and like earlier amendments, attempted to change Mid-Delta's integration proposal. As with earlier amendments, certification pages were not included. Federal Rule of Evidence 406 provides that:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The Notes of the Advisory Committee on Proposed Rules which follow Rule 406 point out that "[a]agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion." The evidence outlined above clearly establishes that Mid-Delta followed a routine in filing amendments. That evidence is "highly persuasive" that Mid-Delta acted in conformity with that routine and did not submit a certification page on March 12, 1982.

40. All of the other extrinsic evidence presented in this proceeding supports the conclusion that Mid-Delta followed its established routine in connection with the March 12, 1982 "amendment" and did not prepare or have signed a certification page on March 12, 1982. Thus, Mid-Delta did not submit a certification page on the date it proferred its March 12, 1982 *AM* amendment, and has never filed such a certification page. Since Mid-Delta prepared *two* amendments for filing on March 12, 1982, it would logically have prepared *two* certification pages. Instead, Mid-Delta claims, without explanation, that it prepared just one certification page related only to the FM amendment. Also, Mid-Delta gave no indication in its March 12, 1982 filing that a certification page existed or would be forthcoming in the future. If Mid-Delta had broken its routine and prepared a certification page in advance of filing, it would logically have apprised the Commission of that important fact at the time it filed its applications.

41. Finally, there is significant evidence which points to the conclusion that the certification page was signed on or about March 30, 1982. Thus, it

was not until eleven days after Grantham called the certificate page deficiency to Mid-Delta's attention that a certification page appeared mysteriously in a Mid-Delta filing with the Commission. It is significant that Mid-Delta's records only disclose the express mail delivery to Washington on March 30, 1982. Coincidentally, counsel's records reflect a telephone call to Mid-Delta's principals on March 29, 1982. The signing of the certification page on or about March 30, 1982 is a more logical explanation than the discredited "delays in the mail" alibi for the three week gap between March 12, 1982, the cut-off date, and April 2, 1982, the date the document was filed. In this connection, there was ample motive for misrepresenting the date of signing since a truthful representation would have precluded any chance of acceptance of Mid-Delta's amendment upgrading its integration proposal. Mid-Delta's misrepresentations concerning the date when the certification page was signed, standing alone, warrant disqualification of its application.

42. Further, the evidence shows that Mid-Delta made repeated misrepresentations to the Commission by urging that "delays in the mail" caused the three-week gap between the alleged signing of the certification page and its filing with the Commission. Sanders admitted that the certification page bearing the March 12, 1982 date was not sent to Washington until March 30, 1982 and that it was sent on that date by an express delivery service. Mid-Delta had asserted in a pleading filed at the Commission on April 2, 1982, *just three days after the express mail package was sent,* that the three-week delay in filing was due to "*delays in the mail.*" When Mid-Delta first advanced its "mail-delay" explanation, Sanders knew that no such delays in the mail had occurred and that the document had been sent at Sanders' instructions by an express service on March 30, 1982. Mid-Delta invented the "delays in the mail" excuse in order to gain acceptance of its amendment upgrading its integration proposal. In further efforts to gain acceptance of the amendment, Mid-Delta used this mail-delay explanation on three subsequent occasions. Sanders himself repeated it in an affidavit opposing a motion to enlarge issues in this proceeding. The repeated use of the "mail delay" representation which Sanders knew to be false constitutes a further basis for disqualifying Mid-Delta.

43. Additionally, the record establishes that Sanders testified falsely at the hearing in asserting that prior to October 12, 1983, he honestly believed that the certification page had been lost in the mail. As discussed, *supra,* Sanders, by his own account, knew in mid-March or the latter part of March 1982 that the certification page had not been mailed. In fact, he had instructed his secretary to find the document and send it by express mail to Washington. Sanders' unwillingness to be truthful at the hearing

about the "mail delay" alibi further evidences Mid-Delta's unfitness to be a licensee.

44. The Commission has consistently disqualified applicants for misrepresenting facts in filings with the Commission. *See RKO General, Inc.*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 475 U.S. 1119 (1982); *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).[15] Indeed, the Commission's entire scheme of regulation is premised on an assumption that applicants and licensees will be truthful in their dealings with the Commission. The only way the Commission can make its regulatory scheme function effectively is to deal firmly with parties who misrepresent facts. Since Mid-Delta has clearly misrepresented facts to the Commission on multiple occasions and testified falsely in a futile attempt to excuse its derelictions, the disqualification of Mid-Delta is mandated.

Comparative Issue[16]

45. The standard comparative issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communication.

Diversification of Mass Media

46. None of the applicants has media interests. Mid-Delta's and Grantham's contention that Leflore has attributable media interests is rejected. Grantham relies upon *San Joaquin Television Improvement Corporation*, 59 RR 2d 1206 (Rev. Bd. 1983) to support its contention that Leflore should be assessed a diversification demerit. However, that case involved an applicant's principals who were then involved as directors of a non-profit broadcast entity and the Commission equates such positions with participating broadcast ownership interest in comparative cases. *Roanoke Christian Broadcasting Inc.*, 52 RR 2d 1725, 1727, (Rev. Bd. 1983). Furthermore, in the *San Joaquin* case the principals in question were not only on the Board, but they were also actively and extensively involved in the management of the station. In the instant case, neither Keith Worrell nor Anthony Browning have ever held any ownership interests in any broadcast station. As indicated, there is no evidence that Worrell played a significant management role at WXXX after the cut-off

[15] See also *WADECO, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980); *Continental Broadcasting v. FCC*, 439 F. 2d 580 (D.C. Cir. 1971); *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied sub non. W.W.I.Z., Inc. v. FCC*, 383 U.S. 967 (1966).

[16] Notwithstanding Mid-Delta's disqualification, its comparative qualifications will be considered, *infra*.

dates. Further Browning's position at station WGRM, Greenwood, Mississippi, which he assumed in January 1983, is of a temporary nature. Leflore has made it clear that Browning would leave his temporary position at WGRM to work full-time for Leflore (Leflore Ex. 5, p. 5). Accordingly, Worrell's past connection and Browning's present connection are not attributable media interests.

Best Practicable Service

Integration

47. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners - including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated" (*Policy Statement, supra,* at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company,* 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied,* FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement,* 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a non-managerial position. *Bradley, Hand and Triplett,* 89 FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.,* 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continential Broadcasting Co.,* 88 FCC 2d 830, 839 (Rev. Bd. 1981).

48. Leflore is entitled to full-time integration credit for the proposed participation of Leflore principals Keith Worrell (44%), Anthony Browning (8%) and Hardin Browning (8%). All will hold management level positions. Grantham's contention that the three principals should only receive part-time credit since they will also perform, from time to time, non-management functions is rejected. Grantham's argument may have some validity in a case involving a large urban market such as New York City. However, at a small station such as the proposed Greenwood facility, it would be highly unusual if integrated principals did not also perform non-management functions. Leflore correctly notes that none of the cases cited by Grantham supports the proposition that a principal performing true managerial responsibilities who also performs non-management functions as part of his duties loses his managerial status. Leflore

receives no integration credit for 8% stockholders James Brown and David Brown who propose to work 40 hours a week as announcers. Plainly, an announcer fills neither a management nor a policy role at a station. The same is true for Susan Mansfield (8%) stockholder) who proposes to be in charge of "traffic" full-time and Alice Worrell (8%) stockholder), who proposes to devote full-time to "accounting/bookkeeping." Neither will have management or policy responsibilities at the station. Both of their proposed positions are non-managerial and are also entitled to no integration credit. *Bradley, Hand, supra; Scott & Davis, supra; New Continental, supra.* Accordingly, Leflore will be awarded 60% full-time quantitative integration credit. Leflore also receives 60% qualitative enhancement credit for residence, civic involvement, and prior broadcast experience of the three integrated principals.

49. Mid-Delta is entitled to 20% full-time integration credit based on Henry Hughes' promise to work as general manager on a full-time basis. Mid-Delta will also receive 20% substantial part-time enhancement based on Lee A. Frison's proposal to work thirty hours a week as business manager.[17] The post of business manager is explicitly recognized in the *Policy Statement* as being a significant policy-making position. No credible evidence has been offered which undermines Frison's entitlement to such integration credit. The fact that Frison's duties will include such tasks as bookkeeping is, as pointed out, *supra,* not unusual in a small station operation. Mid-Delta is entitled to no integration credit for Alix Sanders' proposal to work 30 hours a week as General Counsel of the stations. The Commission has consistently held that the position of general counsel is a consultative position and is entitled to no integration credit. *San Joaquin, supra.* Moreover, Sanders' testimony makes clear that he does not plan to fill the role of station general counsel for even the minimum twenty hours a week required to claim part-time credit. See *Midwest, supra.* Accordingly, Mid-Delta is entitled to 20% full-time integration credit and 20% substantial part-time integration credit. Hughes' integration is qualitatively enhanced by his local residence, civic involvement and broadcast experiences. Frison receives enhancement credit for his minority ownership, his prior residence and civic involvement within the proposed service area and his promise to move to Greenwood.[18]

50. Grantham is entitled to 100% full-time integration credit based on Ronnie Grantham's promise to work as full-time general manager. Both Leflore and Mid-Delta attack Grantham's integration proposal. They point

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[17] See *Van Buren Community Service Broadcasters, Inc.,* 87 FCC 2d 1018 (Rev. Bd. 1981).

[18] Proposed future local residence is accorded less weight than present residence of several years duration. *Policy Statement, supra.*

out that in response to Question 27 of his applications, Grantham listed his "position" as "applicant." They then contend that Grantham's proposal in his direct testimony to work at the station as General Manager constitutes a variance from the application and cannot be credited. This argument is without merit.[19] No variance has been shown. By listing "applicant" as his "position" at the time he answered Question 27 Grantham was obviously not setting out the position he would occupy at the proposed station in the event of a grant. "Applicant" is not a position at a station. Grantham can be an "applicant" *and* plan to work at the station in the event of a grant as General Manager.[20] The two are in no way inconsistent and simply do not raise a question of variance. The relevant case law holds that Question 27 does not call for an applicant's entire integration proposal. *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982). A variance exists only when an applicant chooses to advance a full integration proposal in response to Question 27, setting out specific job titles and time commitments, and then later tries to upgrade the proposal by changing those job titles and time commitments. Since Grantham did not set out his proposed job title at the station in his application — except insofar as he indicated that he would work full-time and be responsible for all day-to-day policy decisions – there is no variance here. Grantham is, therefore, clearly entitled to 100 percent integration credit for his proposal to work full-time as the station's General Manager. Grantham is entitled to qualitative enhancement credit for local residence, civic involvement and broadcast experience.

Auxiliary Power

51. Both Grantham and Mid-Delta propose auxiliary power and merit slight preferences in this regard over Leflore. Leflore proposes to borrow an auxiliary transmitter from the local Civil Defence Council. While the availability of this loan to Leflore is in some doubt, since the Council has not formally approved the loan, and no emergency generators are currently in stock, the most pertinent fact is that the "loan" is subject to recall by the Council. Worrell conceded that in the event of a serious power outage, the civil defence agency would reclaim the generator and allocate it to a hospital or some other "critical" organization. It would be illogical to grant Leflore a preference for an emergency generator that would not be available during area-wide power outages, the precise time when the station would most need the generator.

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[19] The Presiding Judge rejected the variance argument when it was raised at the outset of the cross-examination of Grantham (see Tr. 745-746).

[20] In fact, Grantham's being General Manager is entirely consistent with his answer to Question 27, in which he listed himself as working full-time and making all the key policy decisions at the station.

Final Comparative Evaluation

52. None of the applicants enjoy a diversification preference. Grantham receives a substantial integration preference over both Leflore and Mid-Delta for its proposed 100% full-time integration as opposed to Leflore's 60% full-time integration and Mid-Delta's 20% full-time integration and 20% substantial part-time integration. It is well established that qualitative attributes of participating owners man enhance the value of a integration proposal but cannot overcome a clear quantitative difference. *Van Buren, supra.* Leflore's integration proposal is also clearly superior to Mid-Delta. Its proposal to integrate on a full-time basis principals holding a controlling interest warrants a moderate to substantial preference over Mid-Delta. Moreover, assuming Mid-Delta is not disqualified, its misconduct would warrant a decisive comparative demerit. Grantham and Mid-Delta receive a slight comparative preference for proposing auxiliary power. However, this factor is of only minor significance and does not affect the relative comparative standings of the applicants. This case involves the award of both an AM and FM license. However, to award two licenses to one of the applicants where one of the other two applicants has been found to be basically qualified, offends Commission policy respecting diversity of ownership of the news media. Each of the applicants has expressed a preference for the FM grant. In accord with these preferences, Grantham, which has the superior proposal, will be awarded the FM grant. Leflore, which has the second best proposal, will be awarded the AM grant.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Ronnie J. Grantham for a construction permit for a new FM station in Greenwood, Mississippi IS GRANTED and the applications of Leflore-Dixie, Inc. and Mid-Delta Broadcasting, Inc. ARE DENIED; That the application of Leflore-Dixie, Inc. for a construction permit for a new AM station in Greenwood, Mississippi IS GRANTED and the applications of Mid-Delta Broadcasting, Inc. and Ronnie J. Grantham ARE DENIED.[21]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

[21] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Rates, Charges
Message Telecommunications Service (MTS)
Rate Structure

Commission invites comments on proposal to adopt guidelines for optional MTS rates and rate structure plans of AT&T and other dominant carriers that the Commission can use to determine whether particular tariff filings will warrant investigation pursuant to 47 U.S.C. § 204. Notice describes several possible alternative standards that might be adopted.
—*MTS Rates*
CC Docket No. 84-1235

FCC 84-564

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans	CC Docket No. 84-1235

NOTICE OF PROPOSED RULEMAKING

Adopted: November 21, 1984; Released: January 9, 1985

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING STATEMENT.

I. Introduction

1. It is essential in exercising our responsibilities under the Communications Act, particularly in guarding against the exercise of market power by AT&T, that we recognize the increase in competitive market forces faced by AT&T, and ensure that our policies are consistent with those forces. We have received an enormous amount of comment and information in a number of our proceedings, suggesting a wide variety of approaches to regulating AT&T during the transition to a more open telecommunications environment. In this docket we do *not* address the issue of whether AT&T continues to have substantial market power but assume arguendo that it does have sufficient dominance to justify regulatory scrutiny of its MTS offerings.[1] Rather we focus narrowly on

[1] Questions relating to dominance and elimination or reform of regulatory scrutiny are being considered in connection with the inquiry into *Long-Run Regulation of AT&T's Basic Domestic Interstate Services (AT&T Inquiry)*, 95 FCC 2d 510 (1983).

how the Commission can most effectively guard against unjust and unreasonable discrimination without unduly impeding strenuous price competition until this Commission reaches any different determination about AT&T's market power. Therefore, our fundamental purpose in this Notice is to seek comment on proposed tariff review principles (rather than practices) that we believe are more compatible with the achievement of our responsibilities and promotion of the competitive process than is the current practice.

2. Recently, the Commission has taken several important actions calculated to enforce Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), consistently with the public interest. On April 24, 1984 we released a *Report and Order* adopting new guidelines for evaluating private line tariffs and volume discount practices.[2] In this proceeding we will attempt to develop similar tariff guidelines for some MTS offerings of AT&T and other dominant carriers. Importantly, in the *Private Line Rate Structure Order* we addressed the pricing principles to be applied to volume discounts.[3] Although we did not explicitly endorse any cost standard in that order, we did carefully note the central role cost standards play in competitive analysis. We found there that requiring all private line and special access volume discounts to be justified by a fully distributed cost (FDC) study did not promote the goals of the Communications Act. We did not, however, address the issue of volume discounts for MTS or other switched services, or the application of FDC principles to a broader class of tariff questions.

3. The rapid changes in the telecommunications environment that led us to issue the *Private Line Rate Structure Order* have not abated. The consequences of carrying out the terms of the Modification of the Final Judgment in *United States v. AT&T,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983), continued progress toward equal access for all interexchange carriers, as well as the further deregulatory steps that have been taken in our Competitive Carrier Rulemaking[4] have contributed to the growth of competition. AT&T's response to this growth has placed great strains on our traditional tariff review procedures. In the context of increasing competition, other rules we have adopted to protect consumers and the competitive process may also take on an increased significance. For example, our resale rules will become a more important source of protection against

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[2] Private Line Rate Structure and Volume Discount Practices, *Report and Order,* CC Docket 79-246, FCC 84-147 (released April 24, 1984).

[3] *Id.* at paras. 32-42.

[4] *See First Report and Order,* 85 FCC 2d 1 (1980); *Second Report and Order,* 91 FCC 2d 59 (1982); *Fourth Report and Order,* 95 FCC 2d 554 (1983); *Fifth Report and Order,* 49 Fed. Reg. 34, 824 (September 4, 1984); *Sixth Report and Order,* FCC 84-566, adopted November 21, 1984.

undue discrimination as resale becomes a more established practice. This may permit a lessened emphasis on searching for discriminatory features in tariffs filed by dominant carriers.

4. It is now a matter of some urgency to design tariff guidelines that continue to protect consumers from the exercise of AT&T's market power, protect competitors from anticompetitive actions, and at the same time allow AT&T to price its services in a way that reflects the true economic costs of providing service. Standards that include elements not reflecting the real economic costs of doing business may confound the competitive process we are trying to foster. In short, our tariff review standards during the transition to an open market should be consistent with the growth of competition, permitting an outcome that is in the public interest.

5. In our *Private Line Rate Structure Order* we stressed the importance of consistency across services of tariffs and having consistently defined rate elements. In this proceeding, we go to a more basic level: consistency of the tariff review process itself with the changing economic realities of the communications industry. We are mindful of the danger that in trying to promote competition we may, in fact, simply control it and predetermine the outcome. Our goal is to be neutral with respect to outcomes, but to ensure openness, and a fair chance for all companies to compete on the same basis.

6. There are several reasons for us now to examine options for alternative MTS rates and rate structures of AT&T Communications (ATCOM) and other dominant carriers.[5] Earlier this year ATCOM filed its Optional Calling Plan (OCP) tariff by which it would offer an optional MTS Service package, marketed as "Reach Out America" but referred to in ATCOM's MTS tariff and herein as the "Block of Time" plan, under a sharply different but overlapping rate structure.[6] The package is primarily for MTS night and weekend calling. The proposed rate structure includes a subscription fee; usage charges which are insensitive to distance and to initial versus subsequent minutes of usage; monthly

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[5] This proceeding specifically addresses dominant carriers' MTS offerings. Our purpose in this proceeding is to develop standards to evaluate "supplemental" MTS rates and rate structures. We assume that the existing MTS rate structure and relationships among rate levels will continue and that these offerings will be supplemented with optional MTS rates. Actual rates are likely to change as a result of cost changes and we shall continue to scrutinize carefully any underlying cost changes. We do not intend to evaluate in this docket what standards should apply to an attempt to change the existing MTS rate structure.

[6] AT&T Communications: Revisions to Tariffs F.C.C. No. 263 and F.C.C. No. 1 (Transmittal No. 79), Mimeo No. 4711, released June 6, 1984, *aff'd*, FCC 84-563, adopted November 21, 1984. *See also* AT&T: Revisions to Tariff F.C.C. No. 263 (MTS), 94 FCC 2d 551 (1983) (tariff revisions implementing, on a limited basis, fifteen Optional Calling Plans).

payment for a minimum of one hour of calling; a higher charge for the first hour of monthly calling than for subsequent hours; and, for an additional monthly flat fee, a fifteen-percent discount off evening MTS rates for any usage. ATCOM promised to make this offering available nationwide, with delays in some areas because of the need for exchange carriers to develop and provide new billing arrangements to Block of Time customers. This offering also raises questions of cost justification because the usage charges do not cover ATCOM's corresponding switched access expenses, and the subscription charge may fail to cover ATCOM's payments to exchange carriers for new customer accounts. The Common Carrier Bureau allowed the Block of Time tariff to become effective, but rejected most of ATCOM's arguments supporting the tariff's rates and rate structure. In affirming the Bureau's decision, we stated our commitment to examine by this proceeding options for MTS rates and rate structures.[7]

7. We also understand that ATCOM may soon file tariffs for several other OCPs, with different rates, restrictions, and rate structures. The development of guidelines will help speed tariff review and reduce carriers' uncertainty in preparing MTS offerings. Because of the high probability that additional "supplemental" MTS filings will have to be considered in the near future, we have chosen to focus our attention on the standards which should be used for review of such filings.

8. Although we are using rulemaking proceedings to develop such guidelines, we do not intend to codify such guidelines as rules that would be binding upon carriers or this Commission in the same sense as rules that appear in Title 47 of the Code of Federal Regulations. We intend to use these guidelines to assist us in determining whether we should or should not exercise our discretion to institute an investigation of new tariff filings pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204. Although publication of such guidelines should be of assistance to the carriers in determining options that are available to them, compliance with such guidelines will not, of course, ensure that this Commission will not elect to investigate a particular filing and will not automatically lead to the dismissal of a Section 208 complaint challenging particular rates or tariff provisions. Conversely, a carrier decision to file a tariff that does not comply precisely with such guidelines will not automatically lead to the rejection of such a tariff, establish a *prima facie* case that any charge or practice is unlawful, or foreclose this Commission from exercising its discretion to refrain from suspending or investigating a particular tariff filing.

9. Given the increasingly important role economic forces now play in driving marketplace results in the industry, we believe it is both necessary

[7] FCC 84-563.

and desirable for the Commission's transitional tariffing guidelines to be cast in a manner explicitly embodying the logic of the market. We believe new guidelines should be stated in explicit economic terms and should be grounded in correct economic analysis of relevant market phenomena. It makes little sense to adopt regulatory standards that are inconsistent with market forces or which economic analysis indicates would reduce consumer welfare. At the same time, reliance upon economic analysis ensures that some measure of internal consistency will characterize the guidelines.

10. An aspect of dominant carriers' traditional MTS rate structure which has policy significance is known as geographic averaging.[8] While traditional MTS charges are distance sensitive, two calls of the same air mileage at the same time are priced the same regardless of possible differences in the costs of supplying those calls. Cost and competitive differences across geographic regions may provide incentives for ATCOM and other dominant carriers to depart from geographic averaging. These departures may take the form of eliminating any geographically-averaged MTS offering, or introducing new MTS offerings (which may themselves be geographically averaged or even distance insensitive) in selected areas. This Notice does not consider arguments for any future geographic deaveraging; we seek to clarify the standards by which we will protect against any immediate geographic deaveraging in dominant carriers' MTS offerings.

11. In light of these reasons for concern about MTS rates and rate structures, we are considering alternative MTS guidelines or standards.[9] We address the possible choices of certain MTS rate elements by dominant carriers. A traditional MTS rate element is the air mileage between the origination and termination points of the call. We are considering whether optional MTS usage charges may be distance insensitive, or may increase with the air mileage between the call's origination and termination points. Next, two new MTS rate elements introduced by the Block of Time tariff are a subscription charge and a minimum monthly charge. We propose to allow the carrier flexibility in using these rate elements. In addition, we address the possible use of rate elements to effectuate geographic deaveraging. We are also considering standards for MTS discounts (such as off-peak-time pricing or volume discounts) and MTS packaged offerings (such as tariffs with a subscrip-

[8] We recently stated: "Regarding switched services, the Commission will fully and carefully examine the policy implications of any proposed departure from the historic practice of geographic rate averaging." *Private Line Rate Structure Order,* 49 Fed. Reg. at 18,108 n.9. *See also* comments and reply comments in CC Docket No. 83-1147 of National Association of Regulatory Utility Commissioners, Rural Electrification Administration, Vermont Department of Public Service, and Rural Telephone Coalition.

[9] See note 5, *supra.*

tion charge, a flat fee, and a reduced usage fee). Any such discount or package would be allowed to become effective if the offering would increase the carrier's MTS net revenues compared to an offering without the discount or package. The increase must occur cumulatively over a given period after the offering's effective date. For this analysis, the carrier must specify reasonable assumptions about its demand, costs, and revenues. This test would be applied to the entire discount or package offering rather than to individual components thereof. No such offering could unreasonably restrict customer selection, resale, sharing, or interconnection. Also, all discounts and packages must be made available to all of a dominant carrier's MTS customers on a reasonable schedule.

12. We are also describing several alternatives that might be used. Interested parties may comment on the proposed guidelines or standards and on the policies and market analyses underlying these proposals. We also seek comments on alternative approaches to regulation of dominant carriers' optional MTS offerings.

II. Statutory Requirements

13. Under the Communications Act of 1934, as amended, it is unlawful for a carrier to charge unjust, unreasonable, or unreasonably discriminatory rates. 47 U.S.C. §§ 201-02. Some terms can be identified as unlawful without need for extensive empirical analysis, such as explicit restrictions on use of the service by certain customers or for certain purposes.[10] Other terms require empirical analysis of whether a carrier's rates closely reflect its costs of providing services or meet competition, and judgment on whether they should be treated as satisfying these statutory standards.[11] Under our rules, dominant carriers must show cost-of-service studies for, and the traffic and revenue effects of, their tariff filings. 47 C.F.R. § 61.38.

14. Even though cost justification is related to just, reasonable, and not unreasonably discriminatory rates, there are several major difficulties in requiring a close cost justification for all aspects of dominant carriers' rate levels and rate structures in optional MTS plans. First, there are inherent limitations in the detail and accuracy of any cost-allocation methodology given the multiplicity of these carriers' services, their joint and common costs, the complexities of identifying costs related to peak-load capacity, the delay in demand and revenue stimulation by an offering, and the application of alternative service arrangements for

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[10] *See Resale and Shared Use of Common Carrier Domestic Public Switched Network Services,* 83 FCC 2d 167 (1980).

[11] *See e.g., American Trucking Ass'n. v. FCC,* 377 F.2d 121, 130 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 943 (1967); *Aeronautical Radio, Inc. v. FCC,* 642 F.2d 1221, 1229-30 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 920 (1981); *FPC v. United Gas Pipe Line Co.,* 386 U.S. 237, 243 (1967); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).

efficient network utilization.[12] Despite our efforts to develop and implement an adequate cost-accounting and cost-allocation methodology,[13] it may be unrealistic to believe that we can scrutinize fully the cost justification for rates pertaining to optional MTS between two points at two different times, pertaining to optional MTS at the same time between two different pairs of points, and so on. While cost analysis will continue to be useful in many aspects of rate regulation, we cannot expect that scrutiny of the cost basis (according to regulatorily-defined costs) for each MTS rate will lead inevitably to just, reasonable, and nondiscriminatory rates.

15. Efforts to use fully-distributed costs to determine rates for an optional MTS offering may produce distortions during the transition to a system of jurisdictional separations rules and access charges that are more precisely cost-based. The continued inclusion of a substantial portion of non-traffic sensitive costs in access charges that are recovered on a usage basis, the absence of peak-off-peak factors in separations and access charge apportionments of traffic sensitive plant, and the use of distance and other weighting factors in separations allocations that may be obsolete, could produce distortions in cost assignments. It would be unrealistic to assume that all or even most of these distortions can be eliminated in the near future. We have tentatively concluded that the existence of such distortions should be taken into account in the development of guidelines for alternative MTS rates that will be useful in the near future.

16. We also believe that it follows from the statutory requirement of just, reasonable, and not unreasonably discriminatory rates that any cost-justification standard must be applied flexibly. For example, we recently replaced the need for detailed cost justification of private line volume discounts with a broad showing of competitive necessity and a structural approach to strengthen market forces.[14] We found that certain departures from rates based on fully-distributed costs stimulate sufficient demand and revenues that customers of the carrier's other services benefit by lower rates and are not discriminated against. We concluded that a price floor above marginal cost, such as fully-distributed-cost pricing, encourages underutilization of productive resources, impairs competition on the basis of relative efficiency, and harms consumers.[15] Similarly, allowing a

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[12] *See AT&T Inquiry,* 95 FCC 2d at 518. *See generally* Braeutigam, *An Analysis of Fully Distributed Cost Pricing in Regulated Industries,* 11 Bell J. Econ. 182 (1980).

[13] AT&T: Private Line Services (TELPAK), Docket No. 18128, 61 FCC 2d 587 (1976), *aff'd sub nom. Aeronautical Radio;* AT&T: Manual and Procedures for the Allocation of Costs; Revision of the Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies, 70 FCC 2d 719 (1978), 88 FCC 2d 83 (1981).

[14] *Private Line Rate Structure Order* at paras. 32-42.

[15] *Id.* at para. 36.

dominant carrier to charge a rate between its marginal and fully-distributed costs for providing MTS to certain customers may ensure that some customers who might have turned to alternative sources of supply will help defer that carrier's costs that otherwise would fall on MTS ratepayers with fewer or no alternatives. We believe that the statutory requirements will be served by developing standards for alternative MTS rates and rate structures other than fully-distributed costs although instituting a fully-distributed cost approach is an option.

17. Another reason for departure from close cost justification is that rate structures require a practicable degree of aggregation and rate averaging. Courts and this Commission have recognized that rates pertaining to reasonable groupings of customers or carriers are lawful even though there may be some variations in costs or competition.[16] Simple rate structures and a few, easily-determined rate elements are particularly important for MTS offerings. The typical MTS customer is less sophisticated in selecting offerings and auditing charges than the typical private line customer. Even if the cost characteristics of individual MTS transmissions could be determined accurately, detailed rate deaveraging would cause complexity and customer confusion which is not warranted by the statutory requirements of just, reasonable, and nondiscriminatory rates.

18. Finally, detailed cost support for all aspects of an MTS offering may impose unnecessary expenses on dominant carriers. These expenses could lead to higher rates paid by consumers, extensive cost-support could delay new offerings, and that burden could impair competition by imposing unnecessary scrutiny of dominant carriers in their rivalry with nondominant carriers. As we noted in the *Competitive Carrier Rulemaking*, "[s]o long as our regulation imposes costs on some firms, and thus on the public, not exceeded by the benefits generated thereby, the provision of communications service by those firms can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artifical costs."[17] Consumers would benefit if we are able to adopt options which check unlawful rates while limiting the cost support required for dominant carriers' alternative MTS tariff filings.

19. We tentatively conclude that the Communications Act supports our attempt to establish MTS rate and rate structure guidelines which reduce our reliance on cost-justification analysis and grant dominant

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[16] *See, e.g., Private Line Rate Structure Order* at para. 21; *Investigation of Access and Divestiture Related Tariffs*, Docket No. 83-1145, FCC 83-470, released February 17, 1984 (ECA Tariff Order) at 7-12; *American Trucking*, 377 F.2d at 132 ("a utility cannot use a rate structure with levels so minute as to meet every gradation in competitors' prices . . . . [A] common carrier must aim at the average."); *Alabama Electric Co-op.*, 684 F.2d at 28-29; *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968).

[17] 85 FCC 2d at 13.

carriers needed flexibility in making competitive MTS offerings. We believe that these carriers can lawfully supplement the existing MTS rate structures they employed over the last several years with new MTS offerings. However, cost analysis may be poorly suited to guide and justify many aspects of these changes because of the unwieldiness of cost accounting, the growth of competitive necessity as a reason for non-cost-based rate differentials, the need for reasonable averaging, and the expense and delay of cost analysis. In the case of ATCOM's private line offerings and the exchange carriers' special access offerings, we found that reliance on rate structure guidelines together with market forces would promote just, reasonable, and nondiscriminatory rates better than would reliance on thorough cost-justification analysis. We recognize that cost analysis alone may be inadequate as a guide in determining whether this Commission should investigate MTS tariff proposals regarding discounts, overlapping offerings with different rate structures, and other factors. The proposals in this Notice attempt to be forward-looking and to promote, not sacrifice, the statutory requirements of just, reasonable, and not unreasonably discriminatory rates.

III. Rate Elements for Optional MTS Offerings.

20. In the *Private Line Rate Structure Order*, we emphasized the public benefits from unbundled, consistently-defined, and consistently-employed rate elements. We found that carriers should select rate elements to reflect market demand for components or packages thereof, pricing convenience for the carrier and customers, and cost characteristics. We also found that a rate element which appears separately in one rate structure should appear separately in all other rate structures.[18] This guideline seeks to facilitate comparison of rate elements in tariff review, help consumers make intelligent choices among available offerings, and enable competitors to obtain the facilities they demand for interconnection and resale. Our objectives and concerns are similar in formulating options for MTS rate elements. For example, we doubt that a single dominant carrier's just, reasonable, and not unreasonably discriminatory MTS offerings would differ in the times for discounts (*e.g.*, one offering with discounts from 5 p.m. to 8 a.m., and another with discounts from 6 p.m. to 8:30 a.m.), or differ in the timing of usage (*e.g.*, one offering with incremental charges based on full minutes of use, and another based on half minutes of use) without adequate explanation or justification. However, we tentatively conclude that there are limited areas for the carrier to file, if it so chooses, overlapping, inconsistent rate elements, as discussed below.

[18] *Private Line Rate Structure Order* at paras. 17-22.

21. *Distance.* Dominant carriers traditionally offered MTS with a rate element for the air mileage between the origination and termination points. Charges increased with this distance, based on a few mileage bands. The conceptual underpinning to this rate element was the simple notion that this distance was directly correlated with dominant carriers' typical transmission costs.

22. Of course, dominant carriers' transmission costs between any two points depend on a number of factors, including the traffic density between those points, their network configurations, and the transmission media used. The bulk of a dominant carrier's costs for supplying MTS do not vary with the air mileage between the origination and termination points of a call. Among the non-distance-sensitive costs are switched access charges, and expenses for billing and collection, advertising, uncollectibles, labor, and other corporate overhead. Also, satellite transmission costs do not vary with distance, and this medium is economical for much long-haul traffic. Non-distance-sensitive (postalized) rates have been adopted by major domestic record carriers, including Western Union Telegraph Co., along with the growth of competition for those services.[19] Postalization simplifies rates and provides pricing convenience for customers and carriers. Given this benefit of postalized rates and because it is difficult to determine the extent to which typical transmission costs vary with distance, the cost averaging inherent in postalized rates may be reasonable.

23. We seek comments on the reasonableness of dominant carriers using optional MTS rates which (1) increase with the air mileage between origination and termination points; (2) are postalized; or (3) increase with the air mileage between origination and termination points for some offerings and are postalized for other offerings. Under option (1), a carrier would not be tied to the mileage bands or the rate differentials across mileage bands in the traditional MTS offering. Nor would a carrier be expected to supply cost justification for its choice of new mileage bands or rate differentials for optional MTS offerings. Option (3) may provide a reasonable means for carriers to introduce postalized rates. While we generally oppose overlapping, inconsistently-used rate elements in different offerings, option (3) may be a useful transitional approach. Again, any mileage bands used should be consistent across a carrier's optional MTS offerings that employ mileage bands. Comments should present recent factual data pertaining to postalized MTS rates.

24. *Subscription and Minimum Monthly Charges.* Dominant carriers' traditional MTS offerings have involved a rate element for usage charges, but no rate element for a flat charge regardless of usage. In contrast, ATCOM's Block of Time tariff contains two new flat-charge rate

[19] *See Competitive Carrier, Fifth Report and Order.*

elements, one for subscription to the offering (which was waived during an initial promotional period), and another for up to one hour of usage (a minimum monthly charge). These paragraphs consider guidelines regarding use of such new flat-charge rate elements.

25. Regarding customer subscription and termination charges for a particular MTS offering, we recognize that dominant carriers incur costs in initiating some MTS offerings for each new customer when it establishes the necessary billing and collection arrangements.[20] Other tariffs contain flat non-recurring charges designed to recover at least part of the customer-initiation costs, and to deter over-ordering of the services by customers (*i.e.*, ordering more of the service than a customer will use and thereby imposing costs on the carrier that it cannot subsequently recover from that customer through usage charges). More generally, we believe that recovering costs directly from cost-causers (*e.g.*, explicit charges for use of directory assistance rather than recovering these costs through MTS usage rates) and recovering non-traffic-sensitive costs through flat charges (*e.g.*, customer line charges) promotes efficiency and equity.[21] Such flat charges facilitate lower usage charges for customers. On the other hand, excessive flat or other non-usage charges for subscribing to a service (*e.g.*, a termination charge which exceeds the carrier's costs of terminating a customer's use of an offering) could unreasonably impair competition or consumers' choices among offerings and carriers. We tentatively conclude that the imposition of subscription and termination charges for alternative MTS offerings do not warrant investigation when such charges reasonably and nondiscriminatorily recover the carrier's costs of initiating or terminating a service.

26. In addition, we tentatively conclude that dominant carriers may continue to choose to recover part or all of their customer initiation and termination costs through usage rather than flat charges. Initiation and termination costs may be sufficiently low that separate charges in certain MTS offerings would cause unnecessary complexity. Bundling these costs with usage costs may promote the attractiveness of an offering to customers without making the offering unlawful. Also, customer demands for MTS initiation, usage, and termination are not separable in the same sense that demand for, say, private line bridging or switching is separable from demand for interexchange transmission. Nor do we see

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[20] *See, e.g.*, AT&T: Block of Time Optional Calling Plan, Transmittal No. 79 (filed April 23, 1984) Section 5 at 24.

[21] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *recon.*, 48 Fed. Reg. 42,984 (September 21, 1983), *further recon.*, 49 Fed. Reg. 7,810 (March 3, 1984), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984) *pet'n for cert. filed*, 53 U.S.L.W. 3070 (U.S. July 18, 1984) (No. 84-95); *AT&T* (Docket No. 18128); *AT&T* (Docket No. 19129).

substantial anticompetitive effects from the carrier's choice to bundle or unbundle these rate elements. Finally, we recognize that the level of customer initiation and termination costs may vary across MTS offerings depending on the billing and collection arrangements necessary, and the marketing implications of separate flat charges may vary across MTS offerings. For example, a promotional period without flat charges may help the carrier assess the attractiveness of an offering's other rates and rate structure. We tentatively conclude that dominant carriers should have flexibility in applying reasonable, nondiscriminatory initiation or termination charges to some MTS offerings.

27. Alternative guidelines for MTS discounts and packages are discussed below. We also invite comment with respect to the lawfulness of including a minimum monthly charge as a separate rate element, such as is shown in the Block of Time tariff. In effect, the minimum monthly charge in the Block of Time tariff involves a bundled offering of up to sixty minutes of usage, with perhaps some discount compared to per-minute usage charges under the other ATCOM Tariff F.C.C. 260 MTS offering. A minimum monthly charge may be a device by which a carrier segments its customers and limits the availability of a discount to high-volume customers. Yet, a two-part tariff (such a flat minimum monthly charge and usage charges) may promote efficient recovery of non-traffic-sensitive costs and network utilization, and allow the carrier to target its offerings reasonably to meet competition. We concluded in the *Private Line Rate Structure Order* that carriers should be able to market bundled packages of channels and services as long as general, basic building blocks were available to meet market demands.[22] Applying this principle to MTS offerings, we tentatively conclude that dominant carriers should be able to offer alternative MTS services with minimum monthly charges as long as they make available unbundled MTS services, *i.e.*, MTS services without a minimum monthly charge, and the offering fits within the other options.

28. *Geographic Deaveraging.* The traditional MTS rate structure has a rate element for usage which varies with the air mileage between the origination and termination points, but not with any other characteristic of these points.[23] As discussed above, the relationship between this distance and the carrier's costs of supplying this call may be weak, and rates based on intermediate-point pricing or distance to carrier-designated points may lead to unreasonable, discriminatory charges. The Block of Time rate structure does not reflect any characteristic of the origination

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[22] *Private Line Rate Structure Order* at para. 20.

[23] WATS employs a variant of this approach. In the WATS rate structure, rate bands are delineated according to air mileage (length of haul) as well as the number of telephones in an area (telephone density). AT&T September 15, 1980 filing, Vol. 2-3, 4.

and termination points (except for delays in the availability of this service in some areas).

29. We do not intend for this proceeding to consider the possible arguments for future geographic deaveraging in MTS rates generally. Beside significantly contributing to the achievement and maintenance of universal service, geographic averaging has contributed greatly to the simplicity and clarity of MTS rates. As competitive alternatives to dominant carriers' MTS offerings grow and customers compare carriers' offerings with exchange conversions to equal access, the benefits of this simplicity to consumers and competition are substantial. In addition, geographic averaging is supported by averaged carrier common line rates and the implementation of a Universal Service Fund.[24] These provisions limit the range of switched access charges across geographic areas. We are uncertain that dominant carriers' cost-accounting and cost-allocation methodologies are sufficiently precise to enable these carriers reasonably to cost justify different MTS rates to points based on the points' size (in population, MTS traffic density, or other characteristic) or location with respect to certain intermediate-pricing points. Finally, we seek to avoid disruptive rate changes for customers in any geographic area. We need to gain experience with the effects of changes in our access charge rules and the Universal Service Fund before considering arguments for or possible forms of MTS geographic deaveraging. Accordingly, we tentatively conclude that an MTS rate structure or alternative MTS rate structure that will or may result in geographic deaveraging would warrant investigation.[25] This would include a separate rate element for switched access costs or any other costs which would effectuate geographic deaveraging.

30. *Summary.* We believe that a dominant carrier's MTS rate elements generally should be unbundled, consistently-defined, consistently-employed, and related to market demand, pricing convenience, and cost characteristics. We also believe that consumers will benefit from simple MTS rate structures. Yet, there may be areas where some carrier flexibility to employ overlapping rate elements may be beneficial to customers. This flexibility can help dominant carriers meet competition and promote efficient use of telecommunications facilities. We do not believe that these carriers must extend the historic MTS rate structure to supplemental MTS offerings. We seek comments on the proposed alternatives or guidelines for rate elements pertaining to distance, subscription charges, and minimum monthly charges. Our discussion of rate elements

[24] *See MTS and WATS Market Structure,* 93 FCC 2d at 281-82; 47 C.F.R. Part 69.

[25] In the event, however, that we adopt the proposed Joint Board recommendations, we would not apply that policy to "anti-bypass" rates that may be required to implement the proposal of the Docket 80-286 Joint Board.

is not intended to foreclose the possibility that dominant carriers will introduce other MTS rate elements and commenters may also discuss the advantages and disadvantages of MTS rate elements not described in this section. Further, we seek comments on the proposed policy relating to geographic deaveraging.

IV. MTS Discounts and Packages

31. The traditional MTS rate structure employed a forty-percent discount off daytime rates for evening usage and a sixty-percent discount off daytime rates for night and weekend usage. Supposedly, these discounts reflected the traffic patterns and the lower costs of serving off-peak usage, and helped stimulate traffic and revenues which contributed to lower rates for all MTS users. Yet, the cost and demand studies supporting these discounts were sketchy at best. Why is the discount forty-percent rather than thirty-five or forty-five percent? The light-handed approach to reviewing this portion of the MTS tariffs resulted, in part, from the limited precision of cost and demand studies. In addition, there was a general understanding that some off-peak discounts would promote just, reasonable, and nondiscriminatory MTS rates. Finally, the Commission relied on the prescription of an authorized rate of return for AT&T and monitoring of its MTS costs, revenues, and earnings to detect and control broad abuses of MTS discounts.

32. Four other types of discount or package components appeared in ATCOM's Block of Time tariff. One type was waiver of the subscription charge for customers who subscribed during the initial promotional period. A second type was a lower charge for calling more than one hour each month compared to the minimum monthly charge for up to one hour of usage. Third, payment of a flat charge would qualify the customer for a fifteen-percent discount off the MTS evening rates. Fourth, the per-minute usage charges were lower under the Block of Time tariff than under the alternative (traditional) MTS offering for many transmissions. These individual features were not supported by cost or demand studies. Instead, the carrier's support data went to the traffic and revenues stimulated by the Block of Time package in its entirety, and to the costs of supplying the entire package. The Commission's review of this tariff did not require detailed justification of each discount or component of the package, but rather looked at whether the package would be just, reasonable, and not unreasonably discriminatory in the context of the other MTS offerings.

33. Continuation of the existing MTS time-of-day discounts, and the Block of Time tariff and the pleadings pertaining to its lawfulness, point to the need for guidelines addressing the standards we will apply in reviewing MTS discounts and packages. Our recent guidelines for private line volume discounts provide a starting point for analyzing MTS

discounts and packages.[26] Our decision rested in part on three findings about rates that cannot be justified through a fully-distributed-costs study, but do exceed the long-run incremental or marginal cost of providing the service. First, we found that these discounts will not injure competition to the detriment of consumers. These discounts promote competition on the basis of relative efficiency, efficient resource utilization, and consumers' welfare. Next, we rejected the argument that all such discounts discriminatorily increase the cost burden on users who do not take the discounted offering. These discounts can stimulate demand for and the revenues from one of the carrier's services, and thereby can allow the carrier to reduce the costs borne by and the rates for its other services. Third, we found that growing competition increased the public benefits from allowing carriers flexibility to employ these discounts. In this context, placing a rigorous evidentiary burden on carriers to justify discounts harms consumers, impairs competition, and threatens the carriers' viability.

34. We believe that these three findings are applicable to MTS discounts and packages. We tentatively conclude that compliance with a fully-distributed-costs standard should not be the test of just, reasonable, and nondiscriminatory optional MTS offerings. Offerings which fail to recover fully-distributed costs may still satisfy concerns about anticompetitive or predatory pricing.[27] In fact, as we found in the *Private Line Rate Structure Order,* strict application of a fully-distributed-costs standard could inhibit the success of efficient firms, harm consumers, and waste society's resources. Also, discounts and packages that do not satisfy a fully-distributed-costs standard may lead to lower rates for all MTS customers, including those whose needs are not met by these offerings. Much of the dominant carriers' MTS revenue requirement involves joint and common costs. Higher demand for switched access services in the aggregate leads to lower switched access charges for each unit of MTS service. Rather than creating revenue shortfalls and requiring cross-subsidies, discounts and packages can stimulate demand and, with it, incremental revenues exceeding the incremental costs of providing these offerings. The new demand and revenues can lower the revenue requirement covered by other MTS offerings and, thereby, lead to decreases in their rates. In addition, nondominant carriers are expanding their networks,[28] increasing their offerings, and restructuring their

[26] *Private Line Rate Structure Order* at paras. 32-42.

[27] *See* discussion of judicial and scholarly standards for predatory pricing at *id.;* Statement of Arrow in AT&T Reply Comments in CC Docket No. 83-1147.

[28] *See* comments and reply comments in CC Docket No. 83-1147 of AT&T and U.S. Department of Justice. *But see* joint reply comments of Allnet Communication Services, ITT Communications Services, RCA Communications, Satellite Business Systems, and Western Union Telegraph Co.

rates. Equal access arrangements are being implemented rapidly. Flexibility for dominant carriers to implement MTS discounts and packages that are attractive to consumers is necessary for these carriers to respond to competition and to protect against higher MTS rates for all their customers.

35. Despite the possible benefits of flexibility for carriers to offer MTS discounts and packages, we remain concerned about the ability of dominant carriers to charge monopolistic, discriminatory, or anticompetitive MTS rates. For nondominant carriers, we found in the *Competitive Carrier Rulemaking* that market forces and our complaint process are sufficient to check unjust, unreasonable, or discriminatory charges or practices. For dominant carriers, we continue to rely heavily on tariff review to check unlawful rates. Given the problems with detailed cost-based regulation of MTS discounts and packages, we propose to delineate the scope of general options for these offerings. These options are designed to satisfy the statutory requirements with greater reliance on market forces and less on cost analysis. One option would be based upon the following three standards for dominant carriers' MTS discounts and packages. We seek comments on these proposals as well as other recommendations for the scope of these guidelines. Clearly, the alternatives are not mutually exclusive and could be used in a variety of combinations. Commenters should indicate the benefits and detriments of using such a combination of options.

Alternative 1: Three Standards.

36. The first alternative guideline or standard deals with concerns about anticompetitive pricing and revenue shortfalls and the burden of demonstration which should be borne by dominant carriers filing MTS discounts and packages. One alternative is that the filing carriers would have to show in the tariff support materials that the MTS discount or package would increase the carrier's net MTS revenues (the carrier's total MTS revenues minus the carrier's total costs of providing MTS offerings, including access costs) cumulatively over an appropriate period after the offering's effective date. The comparison of net revenues would be to an offering without the discount (*e.g.*, evening discount versus continuation of daytime rates during those hours) or without the package (*e.g.*, OCP tariff versus only traditional MTS offering). The support would include specification of the carrier's assumptions about its demand, costs, and revenues, and an explanation of why those assumptions are reasonable. If an offering increases net MTS revenues over a reasonable specified time, it would appear that the offering is not anticompetitive and does not create a revenue shortfall burdening other customers. This test would be applied to the discount or package in its entirety rather than to individual

rate elements. As long as the entire offering satisfies this standard, we do not believe that we should be concerned about the potential anticompetitive impact or revenue-cost relationship of any one component. This flexibility regarding package components should allow the carriers to develop offerings that stimulate demand, increase the carrier's net MTS revenues, promote the efficient use of facilities, and are not confusing to consumers. Furthermore, if the components of any one package are unattractive to any one customer group (*e.g.*, the high minimum monthly charge for a package exceeds the customer-billing costs and makes the service unattractive to low-volume users), that group can turn to an unbundled MTS offering or another package (*e.g.*, an offering with no minimum monthly charge).

37. In order to take account of savings to be passed on to MTS ratepayers in subsequent Carrier Common Line access tariffs, a period of 18-36 months seems appropriate. Analysis of the tariff's impact over 18-36 months reflects that a new offering may have start-up expenses (*e.g.*, marketing costs), demand for the offering may grow over time, and changes in some costs may not occur simultaneously with the offering (*e.g.*, lower switched access changes in response to higher aggregate switched access minutes of use and changes brought about by our access charge rules will require new tariff filings by exchange carriers).[29] A shorter period might unduly constrain the timing of new MTS offerings (*e.g.*, require that offerings priced to reflect the effects of demand stimulation on costs become effective only simultaneously with new exchange access tariffs), encourage rate churn through a sequence of tariff filings as costs and demand change, and limit the carrier's ability to compete. On the other hand, waiting for an increase in net MTS revenues for an indefinite period could risk substantial revenue shortfalls that could compel other tariff filings raising some MTS rates, and could involve anticompetitive pricing.

38. In a world without any overhead cost recovery problem, price ceilings and the standard discussed above might be sufficient to prevent exploitation of market power. Indeed, price ceilings by themselves might be sufficient to achieve this result. Problems of overhead cost recovery do exist,[30] however, and for this reason it is necessary to consider cost recovery in determining the consumer-welfare maximizing structure of rates. Accordingly, we are considering a guideline which would require new tariff proposals to be reasonably projected to increase the contribution to overhead cost recovery within the relevant service category.

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[29] We also seek comment on whether monthly carrier reports should be required in order to monitor whether projected trends are being met.

[30] Marginal costs are generally lower than embedded or average costs in telecommunications.

39. The logic underlying this guideline is similar to that for the first alternative discussed, although in this case the focus is on contribution to recovery of costs *not* directly attributable to production of the relevant product (*i.e.*, nonmarginal costs). Tariff proposals projected to increase the contribution to overhead cost recovery within the relevant service category may not warrant investigation. On the other hand, proposals for new, lower priced offerings which cannot meet this requirement might need to be justified and might not be permitted to become effective without investigation.

40. We are prepared to consider various alternatives to this first standard. For example, instead of relying on a particular period for contribution analysis, we could combine some period with a below-the-line accounting treatment for certain losses. We could also extend the period for positive cumulative impact on MTS revenues, or supplement this test with a time limit for showing positive monthly cash flows. Also, we could create a zone of flexibility for MTS rates, *e.g.*, any discount lowering MTS rates by less than 10 percent or any package involving less than $100 million in annual expenses might be treated as not posing substantial dangers of cross-subsidies and anticompetitive pricing. As an alternative, current average MTS rates might be used as a rate floor. Comments supporting such alternatives should address considerations of carrier flexibility, ease of application in tariff review, and dangers of cross-subsidies and anticompetitive pricing.

41. The next standard attempts to use market forces to help ensure that MTS discounts and packages are just, reasonable, and nondiscriminatory. It would require that no such offering could unreasonably restrict customer selections, resale, sharing, or interconnection. There should be no indirect restrictions like requiring a long notice period before a customer can discontinue a service, excessive ordering and deposit requirements, or technical impediments to resale. We would be concerned about the restraining effects of packages which include a substantial number of discounts or rate elements available only in that package. Some unbundling of that package, *i.e.*, making some of the components available in other offerings, would widen the availability and appeal of those components to diverse customers, and thus lessen the likelihood that packages are used to discriminate in favor of certain customers.

42. The third standard deals with the geographic availability of the discount or package. A dominant carrier must make each of its MTS offerings available to all of its MTS customers. If the carrier anticipates delays in introducing an offering in some areas, its tariff support materials should show its anticipated schedule for introduction by area, describe the reasons for the delays, and explain why the offering should be introduced in some areas before it will be available nationwide. This

standard will check the use of discounts and packages to achieve geographic deaveraging.

43. Standards delineating the scope of dominant carriers' options can speed tariff review of MTS discounts and packages, and increase the carriers' ability to file tariffs which are likely to be allowed to become effective. The three standards would require that these offerings increase net revenues, not unreasonably restrict customer selections, and be available to all of the carrier's MTS customers. Commenters may also want to address alternative standards. If we were to find abuses of the carrier flexibility afforded by these proposed standards resulted in unjust, unreasonable, or unreasonably discriminatory rates, we could always reimpose more detailed cost-justification requirements under the fully-distributed-costs standard.

Alternative 2: Resale

44. Price discrimination among customers can be tried by any seller whose customers' demands are identifiably different and whose customers cannot resell to each other. If the *only* reason that resale is infeasible is that it is disallowed by regulation or other legal restrictions, then removal of the prohibition may suffice to ensure against unreasonably discriminatory rates.

45. If two customers in a market face different prices for the same good or service, there is an efficiency distortion among customers. Both could be made better off by allowing resale. But if they could in fact resell, no one would pay the higher price, so the seller could no longer sell at different prices.

46. We specifically seek comment on whether our existing resale requirements, and the requirement that AT&T continue offering existing services along with new services, are sufficient to prevent unreasonable or unjust discrimination among customers. Specific examples of alleged inadequacy will be more helpful to our evaluation than generalized references to AT&T's market power. Similarly, examples in which resale is currently limiting exercise of market power by AT&T will be more useful to us than mere assertions that the market is competitive.

Alternative 3: Multipart Pricing

47. One possible way to overcome monopoly distortions associated with price discrimination and still ensure adequate cost recovery is multipart pricing. Multipart pricing resembles, but must be distinguished from, price discrimination. Multipart pricing is pricing with more than one element, for example a flat plus a variable rate element. While the purpose of price discrimination is to maximize the excess of revenues over costs, multipart pricing is designed to maximize output and consumer welfare in a manner that is consistent with avoiding a deficit.

48. Regulatory statutes that forbid rate discrimination tend to equate discrimination with difference in rates and nondiscrimination with rate uniformity. Thus, multipart pricing has been suspect and average-cost pricing, although economically inefficient (detrimental to consumers), encouraged. We believe our tariffing guidelines should draw a distinction between desirable multipart pricing and undesirable price discrimination. We seek comment on the usefulness of such a distinction and on the benefits and costs of such an approach.

49. To illustrate the kind of guideline that could be used to distinguish between reasonably and unreasonably discriminatory multipart tariffs, consider a simple guideline for evaluating simple two-part tariffs consisting of fixed and variable charges for usage. This guideline would make the standard of reasonableness whether all customers are charged the same price (variable charge) for the last unit of consumption. If they are not charged the same marginal price, the ways in which the lower-last price buyers would use the product are less valuable than the ways in which the higher-last price buyers do. This creates waste and a loss of consumer welfare. For more complex multipart pricing schemes, general criteria of reasonableness should focus on whether the proposed tariffs result in lower service charges priced closer to marginal costs of production and whether they expand economic welfare.

Alternative 4: Meeting Competition.

50. We recognize that an overly rigid adherence to any set of tariff guidelines could disadvantage ATCOM as it faces increasing competition from new entrants into its traditional markets. Therefore, we seek comment generally on how ATCOM should be allowed to respond to competitive threats, and how, if at all, our guidelines should be adjusted in such circumstances.[31]

51. Specifically, we seek comment on two variants of the ceiling approach. The first requires that proposed tariff offerings be subject to duration requirements. For example, if a new ATCOM proposal cut the price of a service, ATCOM might be required to keep the new tariff in

[31] We also encourage comments on how standards advanced by antitrust scholars to judge whether a firm's pricing policies are predatory might be adapted to our particular needs. Areeda and Turner, Baumol, Bork and Posner are examples of scholars who have such standards; examples of standards advanced include long run (marginal) cost, short run marginal cost and average variable cost. We recognize there is a range of positions on this issue. *See, e.g.*, John S. McKee, *Predatory Pricing Revisited*, Journal of Law and Economics Vol. XXIII (2) (October 1980); Douglas F. Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices*, Antitrust Bulletin (Summer 1979). For an overall discussion and specific references, see Paul L. Joskow and Alvin Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 261 (December 1979).

effect for a specific length of time (*e.g.*, 6 months, 3 years, 5 years). Under the ceiling approach, the dominant carrier would need to receive specific regulatory approval to raise prices. Thus, under this variant, ATCOM would have to commit itself at the outset to maintaining the rate cuts for a substantial period of time. The economic logic of this approach is the same as that underlying imposition of price ceilings: it removes the prospect of supernormal profits in the future and thus the incentive to cut prices to unremunerative levels in the short run.[32]

52. Another tactic for limiting predation focuses on the effects of predation rules on pre-entry economic welfare. Under any rule which allows some freedom to respond to competition, prices will be maintained at higher levels before entry occurs (assuming no or ineffective regulation) than they would be if no post-entry response were permitted. If a firm knows it can respond after entry occurs, it will have less incentive to maintain prices at low, entry-deterring levels than it would if it knew it would not be permitted to respond in the post-entry period. This proposal assumes that the dominant firm possesses exceptional foresight, and is, therefore, in a position to anticipate all the forms competition might take and price accordingly. We seek comment on how realistic this assumption is. Nonetheless, while most economists would argue that competitive responses are part of the competitive process, and a way of spreading its benefits, we seek comment on whether this approach may be useful in some circumstances. However, we recognize that inability to withdraw a price cut will necessarily have the effect of making the incumbent firm reluctant to experiment with new, innovative pricing arrangements.

Alternative 5: Fully Distributed Cost (FDC)

53. An additional alternative is to continue our present approach, relying on a more elborate version of the Interim Cost Allocation Manual (ICAM), to accommodate our tariff review practice to the changing competitive environment.[33] We might also apply standards for acceptable tariffs similar to those enunciated recently in our *Private Line Rate Structure Order*. We are concerned, however, that this approach may not be sufficiently flexible to accommodate an increasingly competitive environment. As we noted in the *Private Line Rate Structure Order*, FDC tariffs for each service offering might undermine competition and the efficient provision of services to customers. We seek comment and evidence on the following questions:

[32] Comments are invited on the possible relevance of *American Telephone and Telegraph Company v. FCC*, 487 F.2d 864 (2d Cir. 1973) to such an approach.

[33] We repeat that this docket is not directed at evaluating the traditional "non-optional" MTS offering. Hence, adopting this approach would not require an examination of existing off-peak discount practices.

(1) To what extent is FDC compatible with an economic approach to telecommunications regulation?

(2) What are the efficiency effects of reliance on FDC?

(3) What, if any, are the equity considerations that can only be met through FDC?

(4) If a FDC methodology is used, should it be based on current procedures as laid out in the ICAM? If some alternative would be better, is it based on gross revenues, directly attributable costs, relative output or some other measures? Commenters should explain how their suggested criteria would operate in an increasingly competitive environment.

(5) As competition develops to different degrees for different services, what incentives will ATCOM have to reallocate common costs? How should the Commission respond to ATCOM's attempts to respond to those incentives?

(6) What are the implications of an FDC methodology for entry policies in competitive markets for unregulated substitutes?

(7) What dynamic considerations (productivity improvement and cost reduction) should govern exceptions to strict application of the FDC guidelines?

V. Conclusion and Ordering Clauses

54. Pursuant to our authority under Sections 4(i) and (j), 201-05, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 154(i) (j), 201-05, and 403, IT IS ORDERED that comments on the proposed guidelines shall be due on February 1, 1985, with reply comments due on March 1, 1985.

55. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R.

§1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

56. In accordance with the provisions of 47 C.F.R. § 1.419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, N.W.

57. Pursuant to the Regulatory Flexibility Act of 1980, it is certified that the guidelines proposed in this proceeding are exempt from application of the statute because they will not have a significant economic impact on a substantial number of small entities. Although some local exchange carriers are small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity," which incorporates the definition of a "small business" in Section 3 of the Small Business Act. The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. This Commission has found all exchange carriers to be dominant in the *Competitive Carrier Rulemaking,* 85 FCC 2d 1, 23-24 (1980). This certification shall be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to Section 605 of the Regulatory Flexibility Act, 5 U.S.C. § 605.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

STATEMENT OF CHAIRMAN MARK S. FOWLER

In this Notice of Proposed Rulemaking, the Commission addresses important issues of pricing policy that must be resolved to ensure a successful transition from regulated monopoly to competitive market organization in telecommunications. During this transition period, entry into the industry has been freed, a competitive resale policy has been implemented to limit unwarranted price discrimination, and we have made

progress toward resolution of our serious fixed cost recovery problem through imposition of a customer line charge. AT&T remains subject to extensive regulatory oversight by the Commission and, I would stress, will continue to remain subject to this scrutiny as a result of any action contemplated in, or that might be taken in direct consequence of, this proceeding.

Here we seek comment to help us formulate guidelines governing AT&T's optional MTS rates and rate structure plans. While continued regulatory scrutiny of AT&T's pricing decisions is fully warranted and consistent with a measured transition to a more competitive environment, the public interest requires that AT&T be given some freedom to compete. The public benefits especially if that freedom can be manifested in innovative pricing proposals that not only lower prices for consumers but also help us meet our fixed cost recovery constraint.

Indeed, it is incumbent on us to take steps to encourage that kind of competition by AT&T, in part so we can determine whether more reliance on a competitive, self-policing model is warranted, and in part to discourage passive, noncompetitive behavior on AT&T's part. If we do not permit AT&T to respond to competition, we might well end up with rates that are too high today and with excess capacity and low rates of capacity utilization during the 1990's. Moreover, a "competitive" industry structure that is merely an artifact of umbrella pricing and dominant firm passivity supplies scant basis for prudent deregulation.

The Commission is operating in a difficult situation because we have a serious fixed cost recovery constraint. In this kind of environment, multipart pricing may have a role to play. We seek to develop a workable set of guidelines on this innovative pricing approach. Another proposal that is set forth for comment in the Notice of Proposed Rulemaking would make increased contribution to fixed cost recovery within a given service category a criterion of acceptability for price discount proposals. If such gains can be reasonably expected to flow from a pricing proposal, this implies that all consumers, not just those who take advantage of the price cuts, are made better off as a result of the offering. If the logic that underlies this result can withstand critical scrutiny and, again, if we can develop workable guidelines, we will have accomplished something very worthwhile.

I am heartened that this decision moves the telecommunications industry one step closer to a level playing field, where market forces supplant pervasive governmental intervention. At the same time, it steers a moderate course, guaranteeing that an increase in latitude for the dominant carrier's pricing does not harm growing competition. I look forward to studying the comments on the proposals set forth here.

Misrepresentation, Financial Qualifications

Review Board affirmed ALJ's denial of application. ALJ's findings of misrepresentation are supported by clear documentary and other substantial evidence.
—*Paradise B/cing Communications Systems, Inc.*
MM Docket No. 82-425

FCC 85R-16

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Paradise Broadcasting and Communications System, Inc. Ilion, New York	BC Docket No. 82-425 File No. BPH-810227AC
For Construction Permit for a New FM Station	

Appearances

P. Michael Shanley on behalf of Paradise Broadcasting and Communications System, Inc. *Charles E. Dziedzic* and *Stephen Yelverton* on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted February 7, 1985; Released February 13, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL.

BOARD CHAIRMAN MARINO

1. A trial-type hearing was held to determine whether Paradise Broadcasting had "misrepresented facts to the Commission concerning ownership of and encumbrances on real property" in order to establish its financial qualifications for a new FM broadcast station. FCC 83M-562, released February 18, 1983. Administrative Law Judge Coufal then found that Paradise had made misrepresentations which were "indicative of a willingness to mislead and deceive the Commission in respect to material matters" and that it was therefore not qualified to be a broadcast licensee. See Initial Decision, FCC 84D-53, released August 16, 1984, I.D. Paras. 10-

12. Our review of the arguments in Paradise's brief and exceptions filed September 17, 1984, and the Mass Media Bureau's Reply of October 10, 1984, has convinced the Board that the ALJ's findings are supported by clear documentary and other substantial evidence, as well as his observations of the demeanor of the witnesses, and that his conclusions are consistent with controlling precedent.

2. To establish its financial qualifications, Paradise relied on ownership of five specific parcels of real estate allegedly worth $215,000. It represented that: "There are no outstanding mortgages on the properties . . ." I.D. Find. 6, 10. Yet, it was established at the hearing that one of the specific parcels of real estate was encumbered with a mortgage of $28,000 at the time of the filing of the application; legal title to a second parcel was held by another person, and still another parcel was mortgaged for $45,000 several days after the application was filed, but the application was never amended to disclose the $45,000 mortgage as required by 47 CFR 1.65. I.D. 4 and 10.

3. The ALJ rejected Paradise's claim that the incorrect statements and the failure to disclose were the result of negligence on the part of its principal and his reliance on counsel. I.D. 10 and 11. Moreover, the Bureau argues in its Reply, p.8, that Paradise's principal was less than candid with its own counsel in failing to tell him about the mortgages which were not reported to the Commission.

4. Even if we assume *arguendo* that Paradise honestly believed that the real estate relied upon had appreciated in value from the $20,000 cost to the $200,000 claimed some six months later (*but see California Broadcasting Corp.*, 56 RR 2d 1319 (Rev. Bd. 1984)), the documentary evidence clearly supports the ALJ's findings that Paradise first failed to disclose an existing encumbrance in its application, and subsequently failed to amend the application to disclose a second mortgage on a different parcel of land.* We have previously commended an ALJ's reliance on contemporaneous documents instead of subsequent rationalizations at hearing. *See Valley FM Radio,* 57 RR 2d 420, 422 (Rev. Bd. 1984). Nor is this a case where the facts establish that the applicant "in good faith" relied on counsel. *See e. g. Pueblo Broadcasting, Inc.,* RR 2d, FCC 85R-6, (Rev. Bd. January 30, 1985), para. 26. Here, as previously noted, the relevant facts were also not fully disclosed to counsel. Paradise's other arguments are even less persuasive, and are fully refuted by the Bureau's Reply Br. pp. 7-13.

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* When an applicant claims an ownership interest in an asset, that claim should be supported by legal title (or its equivalent) or accompanied by an explanation why and how the applicant can nonetheless rely on the asset. *WHW Enterprises, Inc.*, v. *FCC,* D.C. Circuit Nos. 83-2067, et al., February 5, 1985.

5. ACCORDINGLY, IT IS ORDERED, That the Mass Media Bureau's contingent request for remand, filed October 16, 1984, IS DISMISSED as moot; and that the application of Paradise Broadcasting and Communications Systems, Inc., BPH-810227AC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Paradise Broadcasting and Communications System, Inc. Ilion, New York For Construction Permit for a New FM Station	BC Docket No. 82-425 File No. BPH-810227AC

Appearances

Christopher A. Hart of Hart, Carroll and Chavers, P.C. on behalf of Paradise Broadcasting and Communications Systems, Inc.; and *Charles E. Dziedzic* and *Stephen Yelverton* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERIC J. COUFAL

Issued: August 14, 1984; Released: August 16, 1984

Preliminary Statement

1. By *Hearing Designation Order,* 47 Fed. Reg. 33320, published August 2, 1982, the above-captioned application was designated for hearing together with the then mutually exclusive application of Cove Communications Inc. (Cove) for a construction permit at Little Falls, New York. The only issues specified in the designation order were a Section 307(b) issue and the standard comparative issue including areas and populations served. Subsequently, at the request of Cove, there was added in *Memorandum Opinion and Order,* FCC 83M-562, released February 18, 1983, the following issue:

> To determine whether Paradise Broadcasting and Communications System, Inc. misrepresented facts to the Commission concerning ownership of and encumbrances on real property described and in its application as belonging to Dr. Boozer and, if so, the effect of that circumstance on the applicant's basic and comparative qualifications to be a Commission licensee.

A Section 1.65 issue, on a comparative basis only, was also then specified but became moot when Cove's application was dismissed in *Order,* FCC 83M-2292, released July 15, 1983. Because of the potentially disqualifying

issue against Paradise, the Mass Media Bureau took part in order to compile a complete factual record on the issue. By *Order,* FCC 83M-2457, released July 26, 1983, the burden of proceeding with the evidence was placed on the Bureau and the burden of proof on Paradise.

2. Pre-hearing conferences were held on September 27, 1982, May 18, 1983, and July 22, 1983. Hearing sessions were held in Washington, D.C. on September 15 and 16, 1983. The record was closed on August 9, 1984.

Findings of Fact

3. Dr. Bernard Boozer is the sole stockholder and president of Paradise. He has a Bachelor's degree from Western University, Wichita Falls, Texas; a Master's degree from East State Texas State University, Commerce, Texas; and a Ph.D degree from Syracuse University, bestowed in 1976 or 1977. Dr. Boozer taught junior high school and college in Texas. He then taught at Alabama State University and has taught for several years at the State University of New York. Dr. Boozer has at least two outside activities: he is a farmer, raising beef cattle and has been "extensively" involved as a management consultant (Paradise Ex. 1; Tr. 88-91).

4. In the mid-60's, Dr. Boozer became interested in real property as an investment opportunity and tried to gain experience in property development, the activities of being a landlord, and the like. Prior to 1980 he had purchased a home and a farm and had acquired farm property from his family. He had encumbered at least one of these properties with a mortgage (Tr. 90-95). Beginning in the spring of 1980, Dr. Boozer acquired title to four parcels of real property and an interest in a fifth parcel. These parcels, and information related to them, are hereafter listed. They are identified by the name of the street in Syracuse, New York, on which they are situated.

State Street

The property was purchased from the City of Syracuse on May 30, 1980; the purchase price was $1,500 and the property needed rehabilitation; Dr. Boozer applied for a mortgage from the Department of Housing and Urban Development and a mortgage in the amount of $28,100 was executed on November 7, 1980. Rehabilitation of the property began in December 1980 and ended in July 1981 (Paradise Exs. 13, 15; Bureau Ex. 4; Tr. 187-189, 194-195).

Kennedy Street

This property was purchased on August 21, 1980 for $6,000; a mortgage on the property was executed on August 21, 1980 and released November 21, 1980 (Paradise Exs. 3, 4 and 5; Bureau Ex. 5).

Kirk Avenue

The property was purchased on November 5, 1980 for $900 and was in need of rehabilitation. Dr. Boozer applied for a mortgage with HUD on September 12, 1980 and the mortgage in the amount of $45,300 from HUD was executed on March 3,

1981. Rehabilitation began after that date (Paradise Exs. 10, 12 and 22; Tr. 246, 249, 254-255).

Borden Avenue

Dr. Boozer's agent, Barbara Davis, purchased this property from the City on June 5, 1980 for $4,000; it was in need of rehabilitation. Barbara Davis transferred the property to Dr. Boozer on January 13, 1981. A mortgage to the City of Syracuse for $7,600 was executed on March 24, 1981 (Paradise Exs. 1, 6, 7, 9; Tr. 219, 237-238).

Midland Avenue

Donald E. Houck owned the property on June 30, 1970 and then mortgaged it to a life insurance company for $38,000. The mortgage was assigned by the life insurance company to Dr. Boozer on October 6, 1980 in exchange for $5,000. The property was in need of rehabilitation at the time and it was begun in June 1980 and continued to March 1981. The mortgage has been in default since the time of Dr. Boozer's purchase but he has not foreclosed. He has never been the title holder (Paradise Exs. 1, 16, 17; Tr. 271).

5. In the summer of 1980, Dr. Boozer began discussing with his then counsel an application for a construction permit (Paradise Ex. 1). Between then and February 27, 1981, when the application was filed, he gave the attorneys the information that went into the application. From time to time counsel would send Dr. Boozer a draft of part of the application or call on the telephone and at these times information given would be updated (Tr. 157). The final draft, to the best of Dr. Boozer's recollection, was submitted to him in February 1981.

6. The application contained the following statement:

"The funds to be contributed will be derived from the sale of real estate now owned by Dr. Boozer. An appraisal showing certain of Dr. Boozer's properties to be valued at $215,000 is also attached. There are no outstanding mortgages on the properties listed in the appraisal. Accordingly, Dr. Boozer is qualified to meet his commitment of $100,000 to the applicant" (Paradise Ex. 2, pages 27-29).

Also submitted with the application was the following statement which Dr. Boozer signed on November 7, 1980:

It is my intent to sell one or more parcels of real property located in the City of Syracuse, New York for the expressed purpose of raising $100,000 or more as my contribution for the construction and operation of Paradise Broadcast Communications Systems, Inc. (Paradise Ex. 2, page 32).

The application also included a financial statement for Dr. Boozer which was dated November 30, 1980. This statement indicated that he owned unspecified real estate valued at $325,000 which included $40,000 equity in his personal residence and farm. The form indicated no mortgages except for a $39,000 liability on the farm and residence (Paradise Ex. 2, page 33-34). Also included with the application is the signed statement of Donald J. Kirnan, a real estate broker, dated November 19, 1980, which stated as follows:

"The properties listed below are reasonably worth $215,000.00 in the Syracuse real estate market.

1480-82	South State Street	3 unit apt house	$ 40,000.00
131-141	West Kennedy Street	4 unit apt house	25,000.00
200-204	Kirk Avenue	4 unit apt house	30,000.00
278	West Borden Avenue	1 fam-4 bdrm-1 bath	20,000.00
119-121	Midland Avenue	10 unit apt bldg.	100,000.00"

(Paradise Ex. 2, 35).

7. Dr. Boozer testified that he did not read the application before he signed it. His review consisted only "of a cursory examination of items that were brought to my attention on the advise of counsel" (Tr. 148). He was not aware of any need to update information given to counsel and thought he had the financial ability to qualify irrespective of mortgages (Tr. 159-160). Dr. Boozer testified that the statement respecting the lack of mortgages on properties listed was true in the summer of 1980 when he gave the information to counsel (Tr. 149-157). He said he did not make the statement which counsel put in his application and which appears at Paradise Ex. 2, pages 27-29 setforth above (Tr. 162-163). He also testified that the statement which appears above and at Paradise Ex. 2, page 32 was not intended to refer to all the property listed in the appraisal but only to the properties that he then owned.[1]

8. Donald J. Kirnan testified that he has been a licensed real estate broker for 10 years, a licensed agent for 13 years, and has done many appraisals over the past 10 to 12 years (Tr. 346-349). He said that his salesman, G. Maxwell Jones, presented the paper which is quoted in paragraph 7, supra, and represented it to be a solicitation for listings of the properties described; there was no appraisal and he had never seen most of the properties (Tr. 347-350). He did not know Dr. Boozer at the time and never had any direct conversations with him until about ten days before the hearing (Tr. 357). At the time Dr. Boozer told him that he thought the document was an appraisal (Tr. 361). He never billed Dr. Boozer for an appraisal (Tr. 361). Mr. Kirnan never put any restrictions on the use of the documents because he understood it was a device to get the listings (Tr. 362).

9. Dr. Boozer testified that he knew G. Maxwell Jones and that he told Jones that he needed an appraisal. Jones said that he was not a broker but that he would have his broker do the appraisal. About two weeks later, Jones gave the Kirnan letter to Dr. Boozer. He did not tell Jones the purchase prices of the properties or any information with respect to encumbrances. He understood that he would pay for the appraisal by listing the properties with the Kirnan agency if he decided to sell them

[1] The failure to show the State Street mortgage in his financial statement was an oversight by his secretary and himself (Tr. 127-128, 132).

(Tr. 140, 146).[2]

Conclusions

10. Dr. Boozer, a highly educated man with sufficient business skills to permit his employment as a business consultant, acquired 5 pieces of property during a brief time span in mid-1980 for a total cash outlay of less than $20,000. Within the early part of the following year, he filed his application with a list of those properties showing a valuation aggregating more than ten times what he paid for them. At the time the properties were listed in the application, there was a mortgage on one of them, the State Street property, for more than $28,000 and he had no title to another, the Midland Avenue property. Another of the properties, Kirk Avenue, was mortgaged by Dr. Boozer four or five days after the application was filed for more than $45,000 and no amendment to the application was then made to show this. In addition, a financial statement was filed with the application which indicated no mortgage on the State Street property although he had within the same month as the execution date of the financial statement, executed a mortgage on that property. While the issue here is not broad enough to include all those matters, they are all illustrative of a frame of mind or a line of conduct which Dr. Boozer exercised with respect to his application.

11. The excuses made, that the mistakes were by others which he failed to catch or that he didn't think that the statements respecting his property were important, might have some credibility if they came from an unsophisticated person, unschooled in the ways of the business world, but not from Dr. Boozer. That the misrepresentations involved decisionally significant facts is clear. The pattern was to present a false view of the value of Dr Boozer's property interests for financial qualification purposes, and the failure to report the mortgage on the State Street property and the claim of ownership of the Midland Avenue property were significant facets of that plan.

12. It is concluded that the misrepresentations here described are indicative of a willingness to mislead the Commission in respect to material matters. An applicant demonstrating such a characteristic is not qualified to be a Commission licensee.

Accordingly, IT IS ORDERED that the application of Paradise Broadcasting and Communications Systems, Inc. for a construction permit for a new FM station at Ilion, New York IS DENIED.[3]

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[2] Dr. Boozer also said he thought the appraisal was low because his sister, a real estate broker in Baltimore and Washington, had told him the properties were worth more (Paradise Ex. 20; Tr. 184, 333-334; 376).

[3] Unless one of the parties takes an appeal to this initial decision by filing exceptions within 30 days after the date on which the full text hereof is publicly released and unless the

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL, *Administrative Law Judge*

Commission does not renew the case on its own motion, this initial decision will become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Programming
Programming Licensee Control of

The Commission denied a petition for rulemaking seeking the adoption of a Commission rule to require the presidents (or vice-presidents) of the three commercial television networks to appear on their respective networks to explain their networks' programming policies to the public.
—*Programming Practices*

FCC 85-14

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Petition for Rulemaking to Require the National Commercial Television Networks to Explain Periodically to Viewers Network Programming Practices	RM-3934

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 11, 1985; Released: January 15, 1985

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. On June 30, 1981, Gary Shakerdge filed the above-captioned petition for rulemaking. Petitioner seeks to amend the Commission's rules to require the presidents (or vice-presidents) of the three national commercial television networks to appear on their respective networks approximately once every month in prime time to explain their networks' programming policies to the public. No comments concerning the subject petition were received.

2. Petitioner argues that while members of the public may have a dialogue with individual licensees, there is no similar relationship with the networks. Petitioner asserts that the networks are only concerned with ratings and care little about the viewer. Under the suggested rule, viewers would be encouraged to ask questions and comment on network programming and the network executives would respond to these comments.

3. We do not believe that initiation of a rulemaking proceeding in response to petitioner's request is warranted. First, while petitioner contends that the national networks are unresponsive to viewers' needs, no evidence or persuasive rationale has been advanced to support this contention. Moreover, the Commission traditionally has looked to individual licensees in matters of programming responsibility and has accorded them broad discretion in meeting this responsibility.[1] Nothing in the subject petition demonstrates that this approach has been ineffective or inappropriate as a means of furthering broadcast service in the public interest. Finally, petitioner's suggestion that the Commission prescribe a particular form or type of programming for the networks is inconsistent with basic constitutional notions of free speech and contrary to the specific provisions of the Communications Act of 1934, as amended,[2] as well as the general intent of Congress in enacting that statute.[3]

4. Accordingly, IT IS ORDERED That, the above-captioned Petition for Rulemaking (RM-3934), filed by Gary Shakerdge, IS DENIED.

5. IT IS FURTHER ORDERED That, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[1] *See, e.g., Report and Order* in MM Docket 83-670, 49 Fed. Reg. 33588 (Aug, 23, 1984); *Report and Order* in Docket No. 19142, 96 FCC 2d 634 (1984).

[2] Section 326 of the Act, 47 U.S.C. §326, prohibits the Commission from censoring broadcast matter or directing the broadcaster to select or present specific programs. *See, e.g., Memorandum Opinion and Order* (In re Complaint of American Security Council against CBS, Inc.), 94 FCC 2d 521, 527 (1984).

[3] "[i]t seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of broadcasters will government power be asserted within the framework of the Act." *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 110 (1973). *See also FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).*

Settlement
Transfer

Review Board refers joint request for approval of settlement agreement filed by competing applicants to operating bureau. The agreement was contingent on Commission approval of two transfer applications, and referral of request would facilitate expedition and orderliness by permitting the request and transfer applications to be considered together.
—*Public Communications Foundation for North Texas*
BC Docket No. 81-824

FCC 85R-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Public Communication Foundation for North Texas Flower Mound, Texas	BC Docket No. 81-824 File No. BPET-558
Denton Channel Two Foundation, Inc. Denton, Texas	BC Docket No. 81-825 File No. BPET-595
For a Television Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1985; Released: February 8, 1985.

BY THE REVIEW BOARD:

1. In an Initial Decision (I.D.) released February 3, 1984 (FCC 84D-6), Administrative Law Judge (ALJ) Frederic J. Coufal granted the application of Denton Channel Two Foundation, Inc. (Denton) for authority to construct a new noncommercial television broadcast station on Channel 2 at Denton, Texas, and denied the mutually exclusive application of Public Communication Foundation for North Texas (Public) for use of the same frequency at Flower Mound, Texas, located twelve miles south of Denton.

The ALJ predicated his holding on a Section 307(b) determination that the service needs of Denton, Texas were greater than those of Flower Mound but that even if a choice could not be made under Section 307(b), the Denton proposal would on a comparative basis better serve the public interest. I.D., paras. 37-38. Exceptions to the I.D. were filed before the Review Board on April 5, 1984. On June 8, 1984, Public filed a motion to add an air hazard issue against Denton. Thereafter, at Denton's request, the Board, by letter dated June 19, 1984, postponed oral argument and held the proceeding in abeyance pending the outcome of an FAA study to determine whether Denton's proposed tower would pose a hazard to air navigation.[1] A second motion to enlarge issues against Denton was filed by Public on November 27, 1984.

2. On January 14, 1985, Public and Denton filed a joint request for approval of a settlement agreement under which the two applicants would unite their interests and form a new non-profit corporation. The terms of the agreement specify, *inter alia,* (a) the grant of Public's application, as amended, and the dismissal of Denton's application; (b) substitution of Denton, Texas as the proposed city of license with production facilities located therein; and (c) transfer to the new corporation of the licenses of noncommercial stations KERA-TV and KERA(FM), Dallas, Texas, now licensed to Public. Additionally, the agreement provides that residents of Denton will hold no less than 20 percent of the directorships in the new corporation and that a vote of 85 percent of the directors is required to change key corporate provisions. The agreement is conditioned on the merged applicant securing a suitable tower location and Commission approval for such a site, and on Commission approval of the transfer applications for KERA-TV and KERA(FM).

3. In light of the reciprocal nature of the joint request and the transfer applications, the Board is of the opinion that the proper forum for consideration of the joint request is the appropriate processing staff of the Mass Media Bureau. *Cf. Washington Mobile Telephone Co.,* 55 RR 2d 617 (Rev. Bd. 1984). Public is willing to alter its corporate structure and proposed community of license in return for the dismissal of Denton's application and the grant of its own application. The dismissal of Denton's application is, in turn, contingent on Commission approval of the transfers of license for KERA-TV and KERA(FM) to the proposed corporate entity. Referral of the joint request to the Bureau will ensure that the transfer applications and settlement request are considered together and thus evaluated in the most expeditious and orderly manner.[2] Moreover, the

[1] The FAA cancelled a July 3, 1978 Determination of No Hazard concerning Denton's tower on May 9, 1984 and informed Denton that a new study was needed.

[2] These non-profit corporate applicants have been engaged in costly litigation since the filing of their respective applications in 1977.

Bureau's processing staff is best suited to evaluate, in the first instance, the new engineering site proposal presaged in the joint request. Finally, for the sake of administrative orderliness, we are dismissing the pending exceptions and motions for enlargement of issues with leave to resubmit them *nunc pro tunc* in the event the Bureau denies the joint request for approval of settlement agreement.

4. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement, filed by Public Communication Foundation for North Texas and Denton Channel Two Foundation, Inc. on January 14, 1985, IS REFERRED to the Chief, Mass Media Bureau for appropriate disposition; and

5. IT IS FURTHER ORDERED, That the exceptions and brief in support of Initial Decision filed April 5, 1984 by Public Communication Foundation for North Texas and Denton Channel Two, Foundation, Inc., respectively, and the motions to enlarge issues filed by Public Communication Foundation for North Texas on June 8 and November 27, 1984, ARE DISMISSED in accordance with paragraph 3 hereof.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Strike Application

In hearing matter of mutually exclusive CP applications for new television stations, Review Board affirmed ALJ's grant. In so doing, the Board rejected a contention by losing applicant that winner had orchestrated challenge to its existing station to force it to drop out of the current comparative hearing.
—*Pueblo Broadcasting Corp.*
BC Docket No. 80-64

FCC 85R-6

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Pueblo Broadcasting Corporation Rosenberg, Texas	BC Docket No. 80-64 File No. BPCT-5147
Texas 45 Broadcasting, Inc. Rosenberg, Texas	BC Docket No. 80-66 File No. BPCT-5131
For Construction Permits	

Appearances

Howard A. Topel, Eugene F. Mullin, Michael L. Glaser and *Francis E. Fletcher, Jr.*, on behalf of Pueblo Broadcasting Corporation; *Joel Levy* and *Brian De Boice,* on behalf of Texas 45 Broadcasting, Inc.

DECISION

Adopted: January 18, 1985; Released January 30, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. Pueblo Broadcasting and Texas 45 both seek a new UHF television station in the Houston urbanized area at Rosenberg, Texas. Although both applicants are made up of individuals with successful and impressive

backgrounds, Initial Decision of Administrative Law Judge Luton, FCC 84D-32, May 15, 1984, paras. 3-11, 12-26, on the comparative issue it is no contest. As the ALJ correctly found, Pueblo is the superior comparative choice on both the "primary" diversification factor and the "substantial" ownership participation factor. Texas 45 was simply unable to overcome the diversification disadvantage due to the fact that it is wholly owned by Weigel Broadcasting Co., the licensee of another UHF television station in Chicago, Illinois. Additionally, Pueblo was undeniably superior on the ownership participation factor. I.D., para. 98. No exceptions have been filed to the ALJ's award of both a diversification and participation preference to Pueblo.

2. At oral argument on November 7, 1984, it became apparent that the only remaining decisional issue is whether Pueblo is responsible for its communications counsel's alleged abuse of Commission process by filing (a) an informal objection against Texas 45's parent television station in Chicago, and (b) counsel's role in the filing of a competing application against the Chicago station's license renewal. (Tr. of Oral Argument, 2922-2923). The Board will affirm the ALJ's ruling that under the circumstances of this case to attribute to Pueblo its counsel's activities in Chicago would "work a manifest injustice" FCC 84M-1961, April 26, 1984, cited below as "ALJ Ruling." Moreover, we do not find that counsel's activities satisfied the Commission-imposed burden of "greater support" where alleged "strike," improper motive, or abuse of process activity is directed against an existing station which can continue to provide service to the public during the course of the administrative proceedings. *Little Rock Radio Telephone Co.*, 89 FCC 2d 400, 404 (1982). See paras. 25 to 34 below.[1]

3. *Major Points:* Texas 45 seeks to extend the Commission's "strike" application or abuse of process policy to counsel's role in the filing of an informal objection and of a competing application against a license renewal. The FCC's Brief, pp. 12-13, in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1946), expresses concern that if the FCC was required to hold consolidated comparative hearings in all cases of conflicting applications, "strike" applications would be filed for the purpose of delaying the licensing of competing stations. Since no bad faith had been shown in *Ashbacker* the Court declared: "We only hold that where the two *bona*

[1] Litigation regarding this matter has spilled over into State and Federal Courts. After permitting full discovery, the U.S. District Judge Prentice Marshall recently held that Pueblo was not legally responsible for the allegedly tortious actions of its communications counsel arising from the conduct which has also been challenged in our case. See *Weigel Broadcasting Co.*, v. *Pueblo Broadcasting Corp.*, No. 83C 7921, N.D. 111. East Div., Memorandum Opinion and Order entered November 29, 1984. In reaching his own independent decision, the District Court did consider (DJ Op. pp. 11-12) the ALJ's Ruling, *supra* which was based on essentially the same record.

fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." 326 U.S. at 333. In the typical strike case, the public will be injured because an existing broadcaster attempts, for anticompetitive reasons, to delay or prevent the advent of new broadcast service in his community by using a "son-in-law" to file a competing application. *See e.g. Blue Ridge Mountain Broadcasting,* 37 FCC 791 (Rev. Bd. 1964), *affirmed sub nom. Gordon County Broadcasting Co.* v. *FCC,* 707 F.2d 1530, 1535-1537 (D.C. Cir. 1983). When the strike principle was extended to an existing broadcaster who used the petition to deny to achieve the same objective, the Court remanded and warned about the danger of chilling a station's legitimate use of such petitions to raise public interest questions. See *Faulkner Radio Corp.* v. *F.C.C.,* 557 F.2d 866 (D.C. Cir. 1977) and on remand *Radio Carrollton,* 72 FCC 2d 264, 271 (1979).

4. Here the strike concept is invoked in a case where the public cannot be injured by delay or denial of service because the existing station continues to operate while the Commission decides whether the objection or competing application has any merit. 47 USC 307(c). When the public is not deprived of service because a station continues to operate, even "greater support" than in *Radio Carrollton* 72 FCC 2d at 271 must be presented by a person seeking a strike or abuse of process hearing. See *Little Rock Telephone Co., supra,* 89 FCC 2d at 404. Texas acknowledges this higher standard of proof, but relying mainly on *Patrick Henry,* 69 FCC 2d 1305 (1978), it claims that it has met the heavier burden. Texas Reply p. 6.

5. After some prodding from the Board at oral argument, counsel for Texas helped narrow the issues when he conceded that "a past broadcast record can't overcome [its] diversification demerit. We have a station in Chicago. They have none. They're minorities . . . We're not a recognized minority. They are integrated, we're not. They're local, we're not. We have got no [comparative] case. Why did they have to go around doing all these things? Why did they have to file an informal objection? Why did they have to file a competing application?" Tr. of O.A. 2922-23. In essence, Texas 45's main points are that Pueblo's counsel "conceived, planned, successfully promoted and choreographed" the filing of the November 1, 1982 application challenging the license renewal of its parent television station in Chicago; that virtually, at the same time, October 26, 1982, counsel was urging Pueblo to attack the same station through the device of an informal objection; and that both the competing application and the informal objection were an effort to embroil the parent company, for Pueblo's benefit, in a defense of the station's record and thereby force them to drop the Rosenberg application. Texas 45's Br. 3-26. Before considering these arguments, which are based largely on speculation and

surmise, we will recount the basic facts which can be found scattered in numerous pleadings, depositions, affidavits, and several decisions in this lengthy record. See paras. 6-24.

Factual Background

6. The two competing applicants were designated for a comparative hearing on February 28, 1980. ID para. 2. Since this is initial licensing, Pueblo's comparative case was based upon the participation of owners who were local residents, civically active, and include some minorities. Pueblo also enjoyed a diversification advantage because its competitor, Texas 45, is 100% owned by Weigel, the owner of another television station in Chicago. ID, paras. 13-26, 45. Texas 45's hopes, on the other hand, were based upon the "proposed" participation of Howard Shapiro in the management of the new Texas station and his broadcast experience in managing the parent Spanish-language television station in Chicago. I.D., paras. 3-11.

7. *Past Broadcast Record of Chicago Station:* On July 13, 1981, some seventeen months after hearing was designated, Texas 45, to bolster its comparative case, tried to make a threshold showing that the programming of the Chicago station was "unusually good." It had purportedly broadcast some 31% news, 4.5% public affairs, and a total of 42% non-entertainment programming which far exceeded the percentages of other television stations in the area. Texas Br. p. 31. This showing was premised on Texas 45's claim that Howard Shapiro, who would participate full time as general manager of the proposed station in Texas, had managed the unusually good Chicago station. (Showing pp. 1-2) This tactical step in the comparative litigation strategy set in motion a chain of events which is the basis for Texas 45's request for a reopening of the record for a further hearing on a "strike" or abuse of process issue.

8. To counter the threshold showing, Pueblo's communication's counsel conducted an investigation of the Chicago television station. Counsel personally spent about a day in Illinois interviewing people who were familiar with the Chicago station; he hired three people in Illinois to tape certain of the station's broadcasts; and three persons were also hired to search public files in Illinois. Pueblo paid a total of $2,465.52 for this Chicago investigation by counsel. DJ Op., *supra*, Note 1, pp. 4-5.

9. Pueblo opposed Texas 45's threshold showing on July 31, 1981 by tendering evidence that the station had been previously fined by the Commission for violating the logging and overcommercialization policy, and subsequently admonished for similar conduct. It also included allegations of advertising fraud, violations of the lottery statute by broadcasting numbers "tips," and other assorted misrepresentations and lack of candor. Procedurally, Pueblo claimed a fatal variance with Texas 45's application since a different person had been proposed as the Texas

station's general manager. Based on *Revised Processing Procedures*, 72 FCC 2d 202 (1979), Pueblo also argued that the showing came too late since discovery and the written exhibits had already been completed. Reply of Pueblo, pp. 5-11.

10. After listening to argument on September 15, 1981, the ALJ orally ruled that he was "unable to conclude that a threshold showing has been made." An opinion was to follow. A year passed, and on December 3, 1982, in a Memorandum Opinion and Order, FCC 82M-3835, the ALJ held that because Texas 45's application expressly proposed that someone other than Howard Shapiro would hold the position of full-time General Manager there was no basis for attributing whatever positive aspects there may be in the Chicago station's past performance to the Texas application. Moreover, on January 20, 1983, Texas 45 itself indicated that Shapiro would no longer move to Texas to manage the proposed station but would remain in Chicago. ID, para. 11.

11. *Actions of Pueblo's Counsel: The Renewal Challenge.* As a result of his investigation, Pueblo's counsel, Howard A. Topel, had concluded that the past broadcast record of Weigel's Chicago television station was poor and vulnerable to a renewal challenge. Topel Aff. 42, ALJ Ruling 7(c), 8. In October of 1981, counsel briefly suggested to Pueblo's president, Jose Adan Trevino, that the Chicago station, whose renewal was due in July of 1982 was vulnerable to a competing application. But Trevino responded that Pueblo's real interest was in the pending Texas application. Topel Dep. 238; ALJ Ruling, para. 4.

12. In March of 1982 Pueblo's counsel advised another client of his firm, Joshua Smith, who had asked to be informed about communications opportunities, that an application challenging the Chicago station had a good chance. Topel Dep. 251; ALJ Ruling para. 4. But Smith was not in a financial position at that point to pursue the matter. Smith Dep. 26.

13. During the summer of 1982, counsel had a series of telephone conversation with Edward Sarbey, a college roommate who had remained a friend. Sarbey was a businessman and lawyer in Massachusetts but was planning a career change and a move to Chicago. Counsel informed him of the business opportunity. Topel Aff. 47; Sarbey Dep. 9, 22-24. Some 27 phone calls were exchanged concerning a possible competing application between August 26, 1982 and January 27, 1983. ALJ Ruling, para. 5.

14. Toward the end of September 1982 Sarbey moved to Chicago and started watching Weigel's station and taking notes. Sarbey Dep. 26. He contacted a close friend Peter Stich, and both decided to learn more about the station. Sarbey indicated to both counsel and Stich that the station was the worst he had ever seen, and "could not believe a city like Chicago could have such a terrible station." Topel Aff. 48; Stich Dep. 33. After they had monitored the station for several more days, Sarbey and Stich,

who had some background in the communications business, both concluded that because of "the poor quality of broadcasting" a competing application presented a business opportunity. Stich Dep. 41, 44, 49.

15. On October 20, 1982, they formed Telecasting, Inc., an Illinois corporation, to file a challenging application to the license renewal. ALJ Ruling, para 6. Sarbey and Stich visited Washington from October 26 to 28 and met with Pueblo's counsel during part of two days. They received considerable assistance and advice about the steps needed to be taken to file a competing application on November 1, 1982. See ALJ Ruling, para. 7(a) to 7(k).

16. Pueblo's counsel had informed Sarbey that he would not be able to represent him but did recommend a member of a large Washington law firm which practices communications law. Sarbey Dep. 40; Topel Aff. 52; ALJ Ruling, para. 7. Sarbey retained his services and on November 1, 1982, the competing application of Telecasting, Inc. was filed. In December, Sarbey and Stich amended their application to include Joshua Smith who had been suggested as a stockholder by Topel. ALJ Ruling para. 10. The record also contains a full statement by Telecasting's counsel describing in some detail his role in the filing and prosecution of that application. See Letter to ALJ Luton dated December 12, 1983, from Richard S. Rodin.

17. Later in responding to questions from Weigel's counsel, Sarbey testified that he had known Pueblo's counsel "a long time, and my impression from him from the days I was in college with him is that he's a very principled, straight individual" who felt that the Chicago station was not serving the viewing public and "deserved a challenge . . . and considered me to be capable of putting something like this together and wanted to help me." Sarbey "never had a sense that Topel was acting in his own self-interest or his client's [Pueblo's] interest." Sarbey Dep. 135, 143-146. Stich rejected the suggestion that their application was a "stalking horse," testifying that based on his own viewing of the station, that of Sarbey, and on information obtained from counsel "we had a valid contest." Stich Dep. 176. Pueblo's counsel declared under oath that "The sole impetus for any communications with the Telecasting principals [Sarbey and Stich] was my legal judgment, based on exposure to the operation and principals of [the Chicago station] that Weigel's license was vulnerable to a renewal challenge." Topel Aff. 41. Counsel did not bill Pueblo for any of his activities in assisting the competing application.

18. *The Informal Objection:* On October 26, 1982 counsel wrote Pueblo's president Jose Adan Tevino a five page letter recommending the filing of an informal objection, 47 CFR 73.3587. He explained that because Pueblo had taken the position in this proceeding that the station's record was poor, its "credibility may be detrimentally questioned" unless a

similar position was advanced in the Chicago renewal proceeding. The letter also reviewed the potential benefits and detriments of such an action. In late October or early November, Trevino authorized the filing of the informal objection which was filed on March 18, 1983. See ALJ Ruling para. 8, and D.J. Op., *supra* note 1, quoted in para. 23 below.

19. *Reaction by Texas 45 and its Parent:* Following the old maxim that the best defense is an offense, Texas 45 and its parent, attacked on at least three fronts, and negotiated on two. The Chicago television station filed a lawsuit in a local Illinois Court claiming that Telecasting had misappropriated information by incorporating into its challenging application proprietory information previously filed by the station. ALJ Ruling, para. 11. Weigel also filed a second lawsuit, this time against Pueblo, and communications counsel, alleging a conspiracy to interfere with the station's business by intermeddling in the FCC proceedings on the station's license renewal. See D.J. Op. *supra* note 1 at p.1; Texas Br.3, n.2.

20. Litigation between Weigel, the parent television station, and the challenging Telecasting applicant was ultimately settled. ALJ Ruling para.13. An attempt to settle between Pueblo, Texas 45 and Weigel was unsuccessful, generating additional recriminations which are detailed in the ALJ's ruling, paras. 14-15, 20-22. With the breakdown of negotiations, and armed with discovery from the State and Federal suits, Texas 45 made another offensive thrust when on November 7, 1983 it filed a petition to enlarge the issues, and reopen the record. The major point of this pleading was that Pueblo and its counsel instigated, aided and supported the Telecasting application challenging its parent television station with the intent of forcing Texas 45 to abandon the Rosenberg application. A similar intent had caused the filing of the informal objection, which it claimed had been used as a bargaining chip in the settlement negotiations. See ALJ Ruling para. 15.

21. *ALJ's Ruling, and District Court's Opinion:* Texas 45's parent had been afforded a full opportunity to take the deposition of Pueblo's communications counsel Topel (431 pages), Pueblo's principal Trevino (157 pages), Telecasting's principals Sarbey (283), Stich (199), and Smith (100). These depositions, and substantial affidavits which contain an identical "nucleus of facts," D.J. Op. p. 11, were considered in the ALJ's Ruling, and the District Court Opinion.

22. In his ruling, the ALJ began by accepting Texas 45's broad generalization that: "Efforts to stir up litigation between third parties and a competing applicant is indicative of abuse of the Commission's processes." He also appeared to accept its specific contention that "through his extraordinary efforts decribed above, Pueblo's counsel did indeed 'instigate, aid and support' Telecasting's application against the [license] renewal." ALJ Ruling para. 16. But after rigorously reviewing the facts

he rejected Texas 45's attempt to link Pueblo's principals to the Telecasting renewal challenge reasoning in para. 17:

> Texas 45's allegations that there was a connection between Telecasting and Pueblo is categorically denied by Pueblo and by its counsel. Texas 45 has obtained the depositions of the Telecasting principals; those depositions establish that none of them know the Pueblo principals or have ever communicated with them. The affidavit of Pueblo's president Jose Adan Trevino is to the same effect: Pueblo had absolutely nothing to do with the filing of the Telecasting application; no principal of Pueblo knows or has ever met or ever communicated with Edward Sarbey, Peter Stich or Joshua Smith, and no Pueblo principal ever authorized Topel or anyone else to do anything with regard to the filing of the Telecasting application.

See also para. 18. Similarly, after carefully reviewing the facts he rejected Texas 45's claim the Pueblo filed or used the informal objection in bad faith. See ALJ's Ruling, paras. 20-22. In sum, the ALJ held that, under the circumstances of this case, it would "work a manifest injustice upon Pueblo whose principals had nothing at all to do with Topel's activities" to attribute those activities to the principals. ALJ Ruling, para. 23.

23. Although the District Court's Opinion, *supra* Note 1, was not based on the Communications Act's "public interest" or "character" standards, its factual findings rest upon the same "nucleus of facts" and thus shed additional light on the dispute in this case. Relevant findings are reproduced below:

> Pueblo was seeking the assistance of a firm which specialized in matters before the FCC. Under these circumstances, it would be reasonable for the client to rely upon counsel to determine the proper course of action. Plaintiff's interpretation that this amounted to *carte blanche* as to all activities by counsel is clearly not warranted by the facts. If this were the case, the letter of October 26, 1982 seeking Pueblo's approval for filing the [informal] objection probably would not have been written. Similarly, the reference to "other parties" in the October 26, 1982 letter must be placed in proper perspective. We have read the five-page letter in its entirety. To construe Pueblo's approval of the course of action set forth in the letter as an approval of the Telecasting application is to engage in mischaracterization. The "other parties" reference appears in a paragraph in which Mr. Topel discusses the "potential down side" of filing the objection. These "down sides" included loss of position if the arguments were rejected, additional costs, and a possible charge of harassment. DJ Op. pp. 15-16.

The Court also rejected the attempt to "bootstrap Pueblo into the conspiracy" to injure the Chicago station by "inferences drawn from Mr. Topel's conduct" because:

> . . . here Pueblo has presented the affidavits of its president and its counsel which deny [Pueblo's] prior knowledge of, agreement to or involvement in the alleged conspiracy. Plaintiff has had the opportunity to engage in discovery, to uncover the details of the plot against it, if one exists. [It] has filed only two affidavits . . . One affidavit related to the appeal [in our Rosenberg case]. And the second concerns a review of Mr. Topel's telephone bills. This showing is not adequate. [*supra* note 1, p. 17.]

Nor could Pueblo be faulted because its counsel shared the material from the Chicago investigation of Weigel's television station with the challenger Telecasting. Pueblo's principals were not shown to have been aware of counsel's actions; moreover:

> An argument might be made that once the information from the Chicago investigation was presented in the FCC proceedings on the Rosenberg, Texas license, it became public information. One would not expect Mr. Topel to secure his client's approval prior to his release of otherwise public information. Therefore, Pueblo's failure to object, absent proof that it had knowledge of Topel's actions prior to the release of the information, is not equivalent of approval of Topel's conduct. [*supra* note 1 at p. 18.]

Finally, the Court stated that the mere fact that the agent, Topel, may have undertaken "an independent course of action which incidentally benefits the principal does not warrant the imputation of all the agent's acts to the principal" because Weigel had "failed to set forth specific facts showing Pueblo's authorization or subsequent ratification of Topel's actions with regard to the Telecasting group." *supra* note 1 at p. 20.

24. Thus, both our ALJ and U.S. District Court Judge Marshall, applying different standards to the same basic facts, found no evidence in this record to tie Pueblo's principals to the alleged improper actions of its counsel.

Discussion

25. *Responsibility of Pueblo's Principals.* First, we consider Texas 45's argument that Pueblo's principals are legally responsible for the actions of their attorney under controlling case law even if, as the ALJ found, they were not aware of counsel's actions. It cites *Belo Broadcasting Corp.*, 43 RR 2d 1633, 1641-42 (1978), *James C. Sliger,* 69 FCC 2d 277 (1977), and *WORZ, Inc.* v. *FCC,* 323 F.2d 618 (1963). Texas Br. 16-18. Pueblo distinguishes these cases in its Reply Br. pp. 12-13, and counters with *Kaye Broadcasting, Inc.,* 29 RR 2d 1509, 1513 (1974), where a licensee was not held responsible for the objectionable trial tactics of its attorney even though the licensee had supported and approved counsel's tactics. At oral argument it cited the very recent decision in *Merrimack Broadcasting,* FCC 2d (FCC 84-496, 1984), where the Commission declined to add an *ex parte* issue against a broadcast applicant which had furnished the sworn statements that its principals had not solicited the ex parte presentations and had no prior knowledge of them. (Tr. of O.A. 2896).

26. In ruling on the petition to enlarge, the presiding ALJ thoroughly reviewed the factual allegations about Pueblo's principals, found no fault with their actions, and firmly held that to attribute to Pueblo the alleged improper actions of its counsel would result in "a manifest injustice." ALJ Ruling at para. 23. Extended research and comparison of the many cases

to extract the controlling legal principles is not required because in *WEBR, Inc.* v. *FCC,* 420 F.2d 158, 167-68 (D.C. Cir. 1969), an attorney-client responsibility issue was also presented and the Court held that: "It is not in the public interest for the Commission to attempt to put legal tags on a party's actions and impute dishonesty merely on legal fictions. It is, however, in the public interest for the Commission to discover who is acting in good faith." Here the ALJ carried out his mandate under *WEBR, supra.* After carefully reviewing the factual record the ALJ concluded that the actions of Pueblo's principals, and their good faith reliance on their counsel, did not raise a character or public interest question which required further hearing. On review of the record, assisted by complete written and oral arguments, we affirm the ALJ's sound exercise of judgment and discretion. Also we find very helpful and persuasive, although not controlling, the District Court's Opinion which after an independent review of the same basic record reached similar conclusions, para. 23 above.

27. *The Informal Objection:* Second, the Commission rules provided that before FCC action on any application is taken, any person may file informal objection to the grant. 47 CFR 73.3587. The record definitely establishes that it was Texas 45 itself which, to gain a comparative advantage, some 17 months after designation for hearing, *belatedly* attempted to inject the past broadcast record of its parent station into this case by claiming an "unusually good" broadcast record, para. 9 above. To protect Pueblo's interest, counsel filed a full opposition trying to show that the record was very poor. Texas 45 now argues that having made its record and secured a favorable ruling by the ALJ on September 15, 1981, Pueblo had no reason to engage in its additional extraordinary actions including the filing of the informal objection. In retrospect, it is now clear that the comparative case was over in September of 1981 when the ALJ ruled out the past broadcast record. But at that time neither applicant realized that the battle was over, and both continued to vigorously litigate.

28. Texas describes Pueblo's informal objection as a massive document containing some 68 pages of legal argument, with 22 attachments totaling an additional 400 pages. Texas Br. p.4 note 3. It concedes that in "a very substantial part" and almost the entire pleading, Tr. of O. A. 2859-60, was the same information which had been filed in this case in opposition to its threshold showing, para. 7, above. It also concedes that the informal objection was not "frivolous," in fact, it raised some public interest questions, since it's hard not to raise some public interest question when you file a 400 page pleading. Tr. of O.A. 2873-75. Under these circumstances we simply do not understand how Texas 45, its parent, but more important, the public, whose interest is paramount, could

suffer any injury because Pueblo's counsel filed with another arm of the Commission a pleading containing the same material already a matter of public record in the FCC's Docket Room. As the District Court pointed out "once the information from the Chicago investigation was presented in the FCC proceedings on the Rosenberg, Texas license, it became public information," para. 23 above.

29. This Board has criticized and sanctioned applicants who have concealed similar material in the hope of coercing better settlement from other applicants. *Gulf Coast Communications, Inc.* 81 FCC 2d 496, 513 (Rev. Bd. 1980). Nor does it make any sense to argue as Texas 45 does that the informal objection was filed so that it could be used as a "bargaining chip" in the negotiations. Once that material was filed with the FCC it could not be removed from the Commission's files without agency permission, and it is the agency which must ultimately decide whether any real public interest questions are presented in any settlement. See 47 USC 311(c)(3).

30. *The Competing Application:* Third, as observed at oral argument, informal objections and competing applications are among "friendly weapons" in the public's arsenal provided by the Communications Act and FCC rules. Tort law does impose some liability for intentional interference with certain prospective economic advantages. *Prosser on Torts* (2d Ed. 1955) pp. 745 et seq.; D.J. Op. *supra* at p. 1. But the Communications Act recognized the unique concept of a private attorney general, who, because of an economic interest, is permitted to participate in FCC proceedings to litigate public interest questions. *FCC* v. *Sanders Brother Radio Station,* 309 U.S. 470, 475-76 (1940). Persons with economic or other crucial stakes are granted standing to participate in FCC cases because to win they have to raise important public issues which might otherwise escape the notice of an agency which is evermore confined to Washington, D.C. and could not in any event possibly be aware of thousands of individual communities and their unique problems. *Office of Communications of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966).

31. Since *Sanders,* 307 U.S. at 475-76, mere economic injury to a broadcaster, or other licensee, is not actionable or cognizable under the Communications Act, unless it can be shown to impact adversely upon the public. *FCC* v. *RCA Communications, Inc.,* 346 US 86 (1953). "Competitors may severely injure each other to the great benefit of the public," *Carroll Broadcasting* v. *FCC,* 258 F.2d 440, 443-44 (D.C. Cir. 1958), and the public may benefit if one station is replaced by another which continues to provide the best practicable service. Also relevant and merging into this analysis is a second line of cases which begins with *Ashbacker,* and extends to *Victor Broadcasting,* 722 F.2d 756 (D.C. Cir. 1983).

32. *Ashbacker* mandated a comparative hearing at the time of initial licensing because the Supreme Court recognized that in renewal proceedings a new applicant would be under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332. See also *Journal Company* v. *FRC,* 48 F.2d 461, 463 (D.C. Cir. 1931); *Chicago Federation of Labor* v. *FRC,* 41 F.2d 422, 423 (D.C. Cir. 1930); *Evangelical Lutheran Synod* v. *FCC,* 105 F.2d 793 (D.C. Cir. 1939); and *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 858 (D.C. Cir. 1970). Despite the historical recognition of an existing station's legitimate renewal "expectancies," see cases cited above, and the difficulties inherent in challenges to license renewals, see *Committee for Community Access* v. *FCC,* 737 F.2d 74 (D.C. Cir. 1984), both the Commission and the Court continue to insist that this spur to competitive performance benefits the public. *Victor Broadcasting, supra.*

33. These general principles require that a private attorney general be given some maneuvering room in pursuing his litigation strategy and that he may even make common cause with those who are challenging the same past broadcast record in a different proceeding. Mr. Topel's alleged orchestration of a competing application is not *per se* proscribed by any Commission case. Texas urges, however, that *Patrick Henry, supra,* its strongest case, requires a hearing. (Tr. of O.A. 2934). In *Henry,* a hearing was ordered against a petitioner to deny a license renewal where explicit evidence of an extortion claim was produced — the petitioner was trying to compel the licensee to sell its station, 69 FCC 2d at 1309. This certainly is not such a case. On this record, after considerable discovery, Texas has failed to uncover any plot or conspiracy showing that Mr. Topel's "primary purpose" was "to advance anticompetitive interests that have no place in our regulatory scheme." *Radio Carrollton, supra,* 72 FCC 2d at 271.

34. The Board recognizes that good things can be misused and abused and has in the past expressed its concern about an applicant's use of questionable investigative threats, *ex parte* and undue pressure. *Muncie Broadcasting Corp.,* 89 FCC 2d 1331, para. 8 (Rev. Bd. 1982) Here we hold that Texas 45 has failed to make the even "greater" showing required by controlling Commission precedent. This conclusion is reinforced by our finding that the presiding ALJ was being asked to reopen the record in a no-contest comparative case which had already been pending for more than four years.[2]

[2] Texas also seeks review of the denial of a real-party-in interest issue (Br. 26-30), which we affirm for the reasons set out in the ALJ's ruling, FCC 80M-1911, October 3, 1980, and a related ruling by the Chief, Broadcast Bureau, Memorandum Opinion and Order, Mimeo 5535, August 5, 1982. Its appeal of the threshold showing on the past broadcast record, (Br. 30-40), if not already abandoned, will also be denied because the request came too late

35. ACCORDINGLY, IT IS ORDERED, That the application of Pueblo Broadcasting Corporation, BPCT-5147, IS GRANTED; the application of Texas 45 Broadcasting, Inc. IS DENIED; the petition for leave to amend, filed on June 17, 1984 by Texas 45 IS GRANTED; and the petition for leave to intervene for limited purpose on behalf of Mullins, Topel et al, filed July 3, 1984 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

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in the proceeding, and Texas has failed to show that this matter can change the result in this comparative case. *See e. g., Hampshire County Broadcasting Co.*, FCC 84R-92, released December 14, 1984, para. 15, and *Big Bend Broadcasters*, FCC 84-645, December 26, 1984, note 1. Pueblo's exceptions, and a related petition for leave to intervene filed on behalf of its communications counsel, have been rendered moot by our disposition of this case.

FCC 84D-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Pueblo Broadcasting Corporation Rosenberg, Texas	BC Docket No. 80-64 File No. BPCT-5147
Texas 45 Broadcasting, Inc. Rosenberg, Texas	BC Docket No. 80-66 File No. BPCT-5131
For Construction Permits	

Appearances

Howard A. Topel, Esq., and *Eugene F. Mullin, Esq.,* on behalf of Pueblo Broadcasting Corporation; *R. Russell Eagan, Esq.; Lawrence W. Secrest, Esq.; Barry D. Wood, Joel Levy, Esq.* and *Brian De Boice, Esq.;* on behalf of Texas 45 Broadcasting, Inc.; and *Lawrence Bernstein, Esq.,* on behalf of the Mass Media Bureau,[1] Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: May 11, 1984; Released: May 15, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Texas 45 Broadcasting, Inc. ("Texas 45") and Pueblo Broadcasting Corporation ("Pueblo") for authority to construct and operate a new UHF television broadcast station on Channel 45 in Rosenberg, Texas. A third applicant, Trinity Broadcasting of Texas, Inc. ("Trinity") also sought the authrization. However, by *Memorandum Opinion and Order* FCC 83M-414, released February 11, 1981, a settlement agreement was approved which resulted in the dismissal of Trinity's application with prejudice.

[1] The Broadcast Bureau is now called the Mass Media Bureau.

2. These applications were designated for hearing by *Order* released February 27, 1980. Of the issues specified in the *Hearing Designation Order*, only the standard comparative issue remains for decision. However, by *Memorandum Opinion and Order* FCC 80M-2655, released December 18, 1980, the following issue was designated:

> To determine whether Texas 45 Broadcasting, Inc. violated the provisions of Section 1.65 of the Commission's Rules and, if so, the effect thereof on its comparative qualifications.

Then, by *Memorandum Opinion and Order* FCC 80M-2697, released December 22, 1980, the following issues were specified:

a. To determine whether Weigel Broadcasting Co., owner of Texas 45 Broadcasting, Inc., and licensee of Station WCIU-TV, Chicago, Illinois, misrepresented the coverage area of WCIU on coverage maps distributed to advertisers and to the public, and, if so, the effect thereof on the basic and/or comparative qualifications of Texas 45 to be a Commission licensee.

b. To determine whether Weigel Broadcasting Co., owner of Texas 45 Broadcasting, Inc., violated Section 73.2080 of the Rules and, if so, the effect thereof on the comparative qulifications of Texas 45.

Findings of Fact

A. The Applicants

Texas 45 Broadcasting, Inc.

3. Weigel Broadcasting Company ("Weigel") owns 100 percent of the issued and outstanding stock of Texas 45. Weigel is the licensee of television station WCIU-TV, Chicago, Illinois (Texas 45 Ex. 78). Weigel also operates television translator station W55AS in Milwaukee, Wisconsin (Pueblo Ex. 59). The translator rebroadcasts the signal of WCIU-TV.

4. Howard Shapiro is the president and a director of Weigel. He has been president of Weigel since July of 1973 and has been a director of Weigel since February 16, 1966. He is the General Manager of WCIU-TV, and is the president and sole director of Texas 45. As of August 15, 1979, Howard Shapiro owned 31.5 percent of the issued and outstanding shares of Weigel. His wife, Jacqueline Shapiro, owned 36 percent.

5. Robert Ward, Jay Sherwin Morris, and Ray Freedman each own less than 1 percent of Weigel's stock. Nieces and nephews of Howard Shapiro own 2.9 percent of Weigel and 8,000 shares are held in trust for the benefit of the children of Howard and Jacqueline Shapiro. The offices of Weigel are Howard Shapiro, President and Director; Jacqueline Shapiro, Director; James Pellegrino, Secretary and Director; Ray Freedman, Director; Robert Ward, Vice President; and Jay Sherwin Morris, Treasurer and Director. The officers of Texas 45 are Howard Shapiro, President and Director, and James V. Pellegrino, Secretary and Treasurer.

6. Howard Shapiro is the controlling principal of Weigel. He has considerable broadcast experience, derived principally from his association with WCIU-TV, Chicago.

7. Mr. Shapiro was born in Chicago, Illinois on January 20, 1926. He attended local grade and high schools in the Chicago area. He was active in scouting as a youngster and continued this interest as a Scout Leader in his adult years. He served in the United States Navy, enlisting in the V-12 program in 1943, studying electrical engineering at Purdue University, and saw duty on a cruiser, a submarine, and other ships operating in the Atlantic. He was honorably discharged in 1946 (Tr. 45, Ex. 78).

8. After the war, Shapiro returned to Chicago, took a specialized course in radio communications at Northwestern University, taught college-level mathematics and electrical engineering at the American Television Institute and, in 1948, started a consumer appliance and television set business known as C.E.T., Inc. Shapiro no longer operates C.E.T., but still controls the company (Texas 45 Ex. 78).

9. In 1967, Howard Shapiro and J.W. O'Connor obtained control of Weigel Broadcasting Co. pursuant to FCC authorization. O'Connor became the president of the corporation, and Shapiro became the chairman of its board of directors. In mid-1973, Shapiro became president of the company, and O'Connor became its chairman. At that time, Shapiro assumed control of day-to-day station affairs.

10. In about 1973, Shapiro took primary responsibility for the program *The Stock Market* Observer, a program which has now run for over twelve years, and personally edited a newsletter for WCIU. Upon becoming president of Weigel in mid-1973, Shapiro made the decision to alter WCIU's transmission facilities to enable the station to broadcast color programming. Shapiro also concentrated on the station's programming schedule. He increased the station's hours of Spanish-language programming from about 22 hours per week to the present 41 hours per week. He increased WCIU's broadcast week from the mid-1973 schedule of 95 to 100 hours to the present week of 117 hours. He also eliminated the English-language reruns from the schedule and added to WICU's non-Spanish ethnic programming. As a result, Mr. Shapiro roughly doubled WCIU's total number of weekly hours devoted to foreign language programming.

11. More extensive findings on Mr. Shapiro's broadcast experience are not warranted.[2] In its direct case, Texas 45 proposed that Shapiro would move to the Rosenberg area and "work at the new station fulltime as its

[2] Much evidence was adduced concerning Howard Shapiro's past broadcast experience. This occurred because of the Presiding Judge's supposition (later determined to have been erroneous) that Shapiro was proposed to be integrated into the operation of the Rosenberg station.

General Manager" (Texas 45 Ex. 78). However, after setting forth the general manager's responsibility for the proposed station's EEO Program, Texas 45's application, at the "B Cut-Off" date (and at present) states, "The General Manager's administration of this Equal Employment Opportunity Program will be reviewed quarterly by the President of the applicant" (Pueblo Ex. 53). Since Mr. Shapiro is the President who is to review the General Manager's administration quarterly, the application plainly indicates that someone other than Shapiro was proposed to be the general manager. Accordingly, Texas 45's direct case proposal for Mr. Shapiro to be the fulltime general manager is a variance from its application. *See, Memorandum Opinion and Order* FCC 82M-3855, released December 3, 1982. By an amendment of its application filed on January 20, 1983, Texas 45 made it clear that Howard Shapiro is not proposed for full-time integration at the Rosenberg station. He now intends to remain in Chicago.

12. As of August 15, 1979, the B-cut-off date in this proceeding, Ray Freedman, a Weigel director and owner of less than 1 percent of Weigel stock, was an officer, director, and 50 percent stockholder of Kleeco Radio, Inc., licensee of station KLEE, Ottumwa, Iowa (Texas 45 Ex. 78, Att. 63).

Pueblo Broadcasting Corporation

13. Pueblo Broadcasting Corporation is a Texas corporation with eight stockholders (Pueblo Ex. 28). The current stockholders, officers and directors are as follows:

Stockholder	*No. of Shares*	*% of Shares*	*Office*
Alfonso C. Pena	3,325	35	Vice President, Secretary, Director.
Jose Adan Trevino	2,303	24.25	President, Director.
Victor M. Delgado	1,164	12.25	Vice President, Director.
Anthony Dickins-Lara	1,164	12.25	None.
Mary R. Medina	1,069	11.25	Vice-President, Treasurer, Director.
Elma Barrera	190	2	None.
Carlos Nava	190	2	None.
Gaston Ponce	95	1	None.
	9,500	100	

14. All of the stockholders of Pueblo are Hispanic surnamed persons; Mary Medina and Elma Barrera are females. Pueblo proposes that only Alphonso C. Pena will be a full-time employee of the station. Mr. Pena is proposed to be the General Manager (Pueblo Ex. 31). He is a 35 percent stockholder, Vice President and Secretary of Pueblo.

15. As the full-time General Manager, Mr. Pena will direct and supervise all station operations, determine day-to-day programming, and set policies for the station. He will hire station employees, supervise and coordinate the station's staff and handle personnel matters, approve day-to-day purchases, and generally manage the station's affairs and daily operations (Pueblo Ex. 31).

16. Mr. Pena is a graduate of the College of Theater Arts in Pasadena, California. He was born in Laredo, Texas on November 4, 1928. He served in the United States Marine Corps from 1946 to 1948. From June 1955 to September 1957, Mr. Pena was an account executive and producer of commercials at radio station KMO in Tacoma, Washington (Pueblo Ex. 31). From September 1957 to October 1958, Mr. Pena was an account executive and originator and producer of commercials at radio station KTIX in Seattle, Washington. In October 1958, he became an account executive at radio station KCKC in San Bernardino, California. There, he handled station promotions and was involved in the creation of new accounts, servicing established accounts and in producing commercials. From June 1960 to September 1969, Mr. Pena was employed at radio station KALI in San Gabriel, California, serving as an announcer until approximately 1968, and then becoming Program Director for the remainder of his employment. During the time that he served as the Program Director, Mr. Pena was involved in the establishment of Spanish-language program formats, directing the selection of station music, supervising the programming personnel, supervising production activities, and calling on clients with account executives in order to expedite the closing of contracts (Pueblo Ex. 31).

17. From September 1969 to November 1970, Mr. Pena was full-time Program Director and an announcer at radio station KWKW, Pasadena, California. His responsibilities as Program Director were similar to those he performed at KALI. In January 1971, Pena became an account executive at television station KMEX-TV, Hollywood, California, and is currently employed there. He is now a resident of Los Angeles, California, but will move to the service area of the proposed station if Pueblo is awarded the construction permit (Pueblo Ex. 30).

18. Six Pueblo stockholders — Jose Adan Trevino, Mary R. Medina, Victor M. Delgado, Gaston Ponce, Elma Barrera and Carlos Nava — aggregate 156 years of residence within the proposed service area, and all of them intend to maintain their local residence (Pueblo Ex. 30). Their records of participation in civic affairs are summarized in the following paragraphs.

19. Jose Adan Trevino is expected to devote an average of 30 hours per month to station affairs. He will have responsibility for the station's equal employment performance and will be active in the matter of

financial oversight (Pueblo Ex. 30). From 1976 to the present, Trevino has been a member of the TriEthnic Committee of the United States District Court in Houston, which is concerned with the implementation of court-ordered desegration in the Houston Independent School District. From July 1980 to July 1981, he was President of the Texas Pharmaceutical Association. From 1975 to 1979, Mr. Trevino served on the Advisory Council on Adult Mental Health to the Harris County Mental Health and Retardation Authority. Since 1965, Mr. Trevino has been a member of Club Sembradores de Amistad in Houston, a social service organization consisting predominantly of Hispanic business and professional men; the organization engages in fund-raising for Mexican-American students. Since 1975, Trevino has been a member of Sembradores de Amistad Educational Foundation in Houston; also since 1975, he has been a member of the Institute of Hispanic Culture since 1965, he has been a member of the Club Recreativo Mexico Bello; since 1972 he has been a member of the Advisory Board of the Pharmaceutical Foundation of the State University of Texas at Austin, College of Pharmacy; since 1974, Mr. Trevino has been a trustee of the Texas Pharmaceutical Education and Research Foundation; since 1978, he has been a member of the Houston Chamber of Commerce; since 1956, he has been a member of the Knights of Columbus Council in Houston; and, since 1958, he has been a member of St. Thomas More Catholic Church in Houston and its predecessor, Corpus Christi Parish (Pueblo Ex. 30).

20. Pueblo proposes that its remaining local shareholders will participate in program preparation to some extent. These stockholders will be called upon for involvement in programs dealing with subject matter in which the stockholders are knowledgeable. It is expected that each of them will participate in a minimum of 15 programs per year. This participation will consist of arranging for appropriate spokespersons to address the particular subject in issue; the contribution of viewpoints on substantial aspects of the program and, at times, participation in the programs themselves (Pueblo Ex. 31). Additionally, Pueblo will, through stockholder meetings held on a regular basis, enable the local shareholders to discuss and approve editorial positions that the station might take, and offer suggestions on matters of interest to the community that might be addressed in the station's programming (Pueblo Ex. 31).

21. Pueblo local shareholder Mary R. Medina has for many years been active as a volunteer at the Ripley House and its predecessor Rush Settlement Nursery, a neighborhood center offering social services to the underpriviledged of Houston. From 1978 to 1981, she was President of the Parish Council of Our Lady of Guadalupe Church in Houston. Since 1978, Mrs. Medina has been a Parish Delegate to the Citywide Conference of The Metropolitan Organization, a city-wide community action group. Since

1980, she has been a member of the board of directors of Catholic Charities in Houston (Pueblo Ex. 10).

22. Victor M. Delgado has been engaged in the private practice of medicine in Houston since 1961. From 1978 to 1981, he was Chairman of the Board of the Houston Mexican Chamber of Commerce. Since 1963, Dr. Delgado has been involved in the medical programs of the Gulf Coast Community Action Association, an organization providing care and services for the poor in Houston and Harris County. Since 1976, he has been a member of Racheros Charro Association, which features cultural activities for the Hispanic community. From 1972 to 1975 he was a member of Los Nortenos Charro Association in Houston, a Hispanic cultural organization. From approximately 1962 to 1965, Dr. Delgado was a member of Club Cultural Recreativo Mexico Bello in Houston. From about 1965 to 1972, he was a member of Club Sembradores de Amistad in Houston. Since 1961, Dr. Delgado has been a member of the Harris County Medical Society and the Texas Medical Association (Pueblo Ex. 30).

23. Gaston Ponce is the owner of Gapoca Enterprises, Inc., a Houston business engaged in record and tape sales. He is a Permenent Deacon of the Roman Catholic Church. From 1978 to 1981, he was President of the Movimiento Familiar Christiano (Christian Family Movement), a national Hispanic organization. From 1979 to the present, Mr. Ponce has volunteered to organize Spanish-language television programs on behalf of the Galveston-Houston Catholic Diocese. He is Treasurer of the Northside Interest Steering Committee, a committee of businessmen and property owners in Houston which meets monthly and obtains donations from its members for community improvements. Since 1968, Ponce has been a member of the Houston Mexican Chamber of Commerce, and a member of the Houston Chamber of Commerce and the Caballeros de Color Knights of Columbus Council 4577 in Houston (Pueblo Ex. 30).

24. From 1972 to the present, Ms. Elma Barrera has been a news reporter at KTRK-TV in Houston, and since 1974 she has hosted a weekly program on that station. From 1975 to 1979 she moderated a weekly news and talk program on Houston's public broadcasting station, and from 1970 to 1972, she hosted a weekly public affairs documentary program on Houston radio station KAUM(FM). Ms. Barrera was active in organizing the International Conference for Women in Houston in 1977. She has devoted time to a number of local charitable activities such as fundraising for the Special Olympics for handicapped children and the American Cancer Society (Pueblo Ex. 30).

25. Mr. Carlos Nava has been an account executive for KRIV-TV in Houston since 1976. Also since 1976, he has been a volunteer at the Ripley House, participating in fundraising and clothing drives, hosting programs

designed to improve communications between the Houston Police Department and the community, and providing transportation for handicapped citizens to cast ballots in elections. Since 1978, Mr. Nava has been a member of American Women in Radio and Television in Houston. Since 1978, he has been a member of the Stratford High School and Westchester Junior High School PTAs in Houston. He is also a member of the Houston Sportswriters and Sportscasters Association, and the Houstonian Club (Pueblo Ex. 30).

26. At the time of the hearing, Gaston Ponce, a 1 percent Pueblo stockholder, had a .59 percent interest in Spanish Broadcasting Corporation, licensee of radio station KLAT(AM), Houston, Texas. Ponce owns his shares as a passive investor. Thirty-two stations provide partial or total service to the KLAT interference - free service contour, including twenty stations licensed to Houston itself (Pueblo Ex. 32). Pueblo stockholders Pena, Trevino, Delgado, Dickins-Lara, Medina, Barrera, and Nava have no interest in any broadcast facility or medium of mass communications other than their interests in Pueblo (Pueblo Ex. 31).

B. Employment Discrimination Issue

27. Rhea Hammer, a female of Mexican ancestry, was hired by WCIU to work on the station's AYUDA and action line program in approximately 1970. Until sometime in mid-1972, Hammer's work at WCIU involved answering the AYUDA action line telephone calls from Chicago Hispanics seeking help with their problems. She was liked by station management and was believed to be a valuable asset to the station during this time (Pueblo Ex. 10 at 510, 528 and 534). In 1972, she ran for Congress. During the race itself, Hammer sometimes came to the station late, devoted large amounts of time to her personal business, and shifted much of the burden for conducting the AYUDA action line to Lilly Acala, the other AYUDA action line worker (Pueblo Ex. 10 at 454, 647, 655 & 668). Hammer lost the race for Congress and continued to neglect her AYUDA action line duties (Pueblo Ex. 10 at 667). Hammer's supervisor in connection with her AYUDA work, Ed Scotch, became exasperated with Hammer because she would not show up until noon sometimes and would not do what he asked her to do (Pueblo Ex. 10 at 497-98). Hammer soon informed J.W. O'Connor, then President of Weigel and Chief Executive Officer in charge of day-to-day affairs at WCIU, that she wished to leave the AYUDA action line program and do something else (Pueblo Ex. 10 at 496-97, 508-10 & 538).

28. Sometime in 1972, Rhea Hammer was offered a job as co-hostess on a program on station WBBM-TV, Chicago. Hammer had a written contract with WCIU which could have prevented her from taking advantage of the WBBM offer and she was anxious to be released from that contract. Howard Shapiro, who was then Chairman of Weigel's Board

of Directors, told Hammer of the station's decision not to insist on its contract rights if she decided to go to WBBM (Pueblo Ex. 10 at 85-86, 487 & 549-55). Shapiro discussed with Hammer the station's plans to improve its facilities, to institute color programming, and to improve its Spanish-language programming. Shapiro indicated that he would like Hammer to be a part of the future that he imagined for the station. Hammer had a discussion with O'Connor in which O'Connor expressed his regret over Hammer's impending move to WBBM, O'Connor asked Hammer to turn down the WBBM offer, or to work both at that station and at WCIU. O'Connor informed Hammer that he had decided to make her WCIU's Executive Director of Spanish Programming (Pueblo Ex. 10, at 445). Hammer accepted O'Connor's offer and declined the offer from WBBM (Pueblo Ex. 10, at 123). With WCIU consent, however, Hammer did perform a number of programs for WBBM.

29. Hammer was interested to see that WCIU publish a formal announcement of her new position, so she discussed the matter with J.W. O'Connor. No announcement was ever issued. According to O'Connor, upon raising the matter of Hammer's appointment with the employees in the Spanish-language programming department, "their reactions were so unexpected and so violent that we did not make the appointment." Those objecting, particularly, were Lilly Acala, Henry Lopez, and Amando Perez. These employees threatened to leave the station if Hammer received the appointment as Executive Director of Spanish Programming (Pueblo Ex. 10 at 447). Thus, O'Connor did not carry through the Hammer appointment because he was afraid of the trouble it would create. He explained that he wanted to save the entire situation; that is, he wanted to keep Rhea Hammer employed at the station and he wanted to keep the other employees also (Pueblo Ex. 10, at 459).

30. At no time did Lopez, Perez, or Acala object to Hammer's appointment on the basis that she was a woman. Also, none of these employees objected to Hammer's appointment because she was Hispanic. Lopez, Perez and Acala were all Hispanic. Acala was a woman. Lopez, WCIU's Spanish News Director, protested that Hammer was conceited, inconsiderate, unqualified to be in charge of Spanish-language programming, and not even fully competent in the use of the Spanish language (Pueblo Ex. 10, at 446-51, 493, 667-73). Lopez told O'Connor that he would resign his position and leave the station if Hammer was made Executive Director of Spanish Programming (Pueblo Ex. 10 at 451, 668). Armando Perez, a Spanish news announcer, voiced similar objections to Hammer's appointment (Pueblo Ex. 10 at 451-53, & 806). Lilly Acala, who had worked with Hammer on the AYUDA action line program, complained that Hammer was conceited, inconsiderate, and impossible to work with (Pueblo Ex. 10 at 451, 507-12, 643-46, & 804-05). O'Connor was also told by

Edward Scotch, the producer of *Ayuda,* and Hammer's immediate supervisor during her tenure on that program, that Hammer was more interested in her own activities than in the program, was uncooperative, and should not be put in charge of Spanish programming at the station (Pueblo Ex. 10 at 454-55).

31. According to Hammer, her appointment was not carried through because, as O'Connor told her: "Well, as I understand it, [the Spanish language programming department] cannot accept a woman as a director" (Pueblo Ex. 10, at 151). O'Connor denied having made such a statement. He claimed that he told Hammer that the reason she would not be put in charge of Spanish-language programming was because the "whole department" including specifically Lilly Acala, Armando Perez, and Henry Lopez, had "rebelled" at the idea (Pueblo Ex. 10, at 459).

32. O'Connor attempted to interest Hammer in a position with the station as a salesperson and program host, believing that such a position would remove her from conflicts with other Spanish language programming employees. Hammer declined the offer (Pueblo Ex. 10, pp. 468 & 974).

33. In June 1973, Hammer demanded a clarification of her position, and O'Connor responded by assigning her to work on the WCIU license renewal application and on certain ascertainment interviews. She was retained on the payroll at her previous salary, and it was understood that, upon the completion of the license renewal assignment, O'Connor intended once again to try to find a position for Hammer that would be suitable for her (Pueblo Ex. 10 at 475 & 980). Soon thereafter, in June 1973, Hammer filed a charge with the Illinois Fair Employment Practices Commission (FEPC) alleging that she had been denied the position of Executive Director of Spanish Programming at WCIU on the basis of her sex and national origin. In November 1973, Hammer was fired by WCIU (Pueblo Ex. 10 at 194 & 982). In January 1974, Hammer filed a second complaint with the FEPC alleging that her discharge had been in retaliation for the complaint she had earlier filed with that Commission (Pueblo Ex. 10, at 38). Hearings were held concerning Hammer's two complaints before an FEPC Hearing Examiner. The Hearing Examiner found in favor of Ms. Hammer on both charges (Pueblo Ex. 10, p. 48).

34. Weigel appealed the Hearing Examiner's decision to the FEPC and it affirmed the Hearing Examiner's findings. Weigel then appealed the FEPC decision to the Law Division of the Circuit Court of Cook County. That Court affirmed the FEPC's finding of discrimination on the first charge, the refusal to appoint Hammer Executive Director of Spanish Programming in deference to the sexist objections of WCIU-TV employees. That finding was upheld as "not contrary to the manifest weight of the evidence." With respect to the second charge, that Ms. Hammer was

fired in retaliation for filing the first charge, the Court found that the FEPC's conclusion was unacceptable. Instead, the Court found that WCIU had tried to keep Hammer satisfied but that her conduct and actions constituted cause for the firing. Rhea Hammer appealed the Circuit Court's reversal of the firing charge. *See, Weigel Broadcasting Co.* v. *Hammer,* 67 Ill. App. 3d 805, 384 N.E. 2d 811 (1978). The appellate court held with respect to Hammer's appeal that the Circuit Court had correctly found that Hammer had been discharged for cause, that back pay and reinstatement were not warranted, and that the FEPC decision to the contrary was against the manifest weight of the evidence. As Weigel had not appealed, there was no issue before the appellate court concerning the finding of sex discrimination, and thus the court did not address that finding or pass on the question of whether it was warranted or was against the manifest weight of the evidence.

C. Section 1.65 Issue

35. The Section 1.65 issue has two aspects. The first concerns Texas 45's failure to report various Weigel financial commitments that were proposed to be met from the same resources on which Texas 45 relied in this proceeding. The other concerns Texas 45's failure to amend its application to report a lawsuit filed against Weigel and Howard Shapiro alleging misconduct in the operation of WCIU-TV. The lawsuit involved was filed by Davide Tomei and is captioned *Tomei* v. *Shapiro, et al.*

Financial

36. The financial aspect of the reporting issue deals with the reporting in this proceeding of financial proposals made by Weigel in three applications that Weigel had filed with the Commission. Those applications were: (1) an application requesting subscription television authorization for WCIU-TV in Chicago ("STV application"); (2) an application requesting authorization to move WCIU's transmitter facilities to the Sears Building in Chicago ("transmitter move application"); and (3) an application seeking authority to construct a television translator station in Milwaukee, Wisconsin ("Milwaukee translator application"). The financial proposal made in these three applications all relied to various extents on the assets of Weigel, and this reliance on Weigel's assets was not expressly reported by Texas 45 in this proceeding.

37. Weigel's STV application was filed in June of 1976. In it, Weigel proposed to finance estimated construction and first year operation costs of $950,000 from existing cash (Texas 45 Ex. 29; Tr. 1551-58). Weigel's June 30, 1976 balance sheet showed total current assets of $1,842,895; total current liabilities of $431,038; total liquid assets of $1,838,603; and net liquid assets of $1,411,857. Weigel thus had ample available assets to finance the STV application.

38. On December 21, 1977, Texas 45 filed its application in this proceeding. That application estimated construction and first year operation costs of $1,394,325. Weigel committed itself to make available to Texas 45 from Weigel's existing assets such funds as were required, up to a maximum amount of $1,750,000. The October 31, 1977 Weigel balance sheet attached to Texas 45's application indicated available assets of $2,099,151. Weigel's commitments at the time to the STV proposal ($950,000) and to Texas 45 ($1,394,325) amounted to $2,344,325 and the commitment thus exceeded Weigel's available assets by $245,174 (Texas 45 Ex. 29 at 17). Weigel's December 31, 1977 balance sheet, which was current ten days after Texas 45's application was filed, showed current assets of $2,670,529; current liabilities of $413,483; liquid assets of $2,633,970; and net liquid assets of $2,257,046. As of December 1977, the total estimated construction and first year operation costs for the STV and the Rosenberg applications were $2,344,325. At the time, Weigel had immediately available $2,257,046 in current net liquid assets to fund total estimated construction and first year operation expenses of $2,344,325. Weigel's shortage was thus $87,279. However, as of 1978, Weigel was earning from its WCIU operation in excess of $700,000 per year in net, after - tax income (Texas 45 Ex. 29 at 17).

39. In October of 1979, Weigel filed its application for authorization to move its transmission facilities to the Sears Building. Total costs for construction in connection with this proposed transmitter move were estimated at $1,030,000, which amount was proposed to be funded from Weigel's existing capital. In its transmitter move application, Weigel noted that $1,150,000 in existing capital would be available to cover the estimated $1,030,000 cost for the transmitter relocation (Texas 45 Ex. 29, p. 57). Accordingly, as of October of 1979, the relevant estimated expenses for the three projects were as follows:

STV application	$950,000
Rosenberg application	711,581
Transmitter move application	1,030,000
Total	$2,691,581

40. Weigel had as of August 31, 1979 current assets of $4,369,739; current liabilities of $655,912; liquid assets of $4,362,972; and net liquid assets of $3,713,827 (Texas 45 Ex. 29, p. 60). Weigel's existing available assets thus exceeded by $1,022,246 the sum of the relevant estimated expenses for the three projects then pending before the Commission.

41. In November of 1979, Weigel amended the financial proposal contained in its STV application. In this amendment, the projected first year construction and operation costs for the STV proposal were increased to $1,286,000. Weigel proposed to meet these costs from its existing capital (Texas 45 Ex. 29, pp. 20 & 68). Accordingly, as of the date

of this amendment, the relevant estimated costs of the three projects were as follows:

STV application	$1,286,000
Rosenberg application	711,581
Transmitter move application	1,030,000
Total	$3,027,581

42. According to Weigel's February 29, 1980 balance sheet contained with the Milwaukee translator application, Weigel had current assets of $5,048,730; current liabilities of $1,039,190; liquid assets of $5,034,143; and net liquid assets of $4,009,540 - enough to meet the relevant estimated costs for the four projects and to provide a surplus of $671,732.

43. On April 24, 1980, Weigel filed an application for authority to operate a television translator station serving Milwaukee, Wisconsin. Total construction and first-year operation costs were estimated to be $132,000. Weigel proposed to meet these costs from its existing resources (Texas 45 Ex. 29 at 87). Thus, as of April, 1980, the relevant estimated costs for the four projects were as follows:

STV application	$1,286,000
Rosenberg application	889,808
Transmitter move application	1,030,000
Transmitter application	132,000
Total	$3,337,808

Weigel's February 29, 1980 balance sheet was contained with the translator application. It showed current assets of $5,048,730; current liabilities of $1,039,190; liquid assets of $5,034,143; and net liquid assets of $4,009,540, Weigel had sufficient existing assets to meet the estimated costs for the four projects and to provide a surplus of $671,732 in existing assets ($4,009,540 - $3,337,808 = $671,732).

44. On July 30, 1980, Pueblo filed the motion to enlarge issues that led to the designation of the financial reporting issue in this case. On August 27, 1980, Texas 45 filed an amendment to the Rosenberg application providing a schedule of Weigel's planned expenditures from existing assets for the STV, transmitter move, and translator proposals (Texas 45 Ex. 29, pp. 92-93). This amendment represented the first time that Weigel's financial commitments to these proposals were stated in the Rosenberg application. The August 27 amendment also showed that Weigel had available to it $2,000,000 in net proceeds from a bank loan commitment; over $1,000,000 in after-tax income per year from the operation of WCIU; and approximately $4,500,000 in existing available assets as of July 31, 1980 (Texas 45 Ex. 29 at 23 & 92-110). Weigel thus had available to it, in August 1980, over $7,500,000 to meet commitments to the four proposals.

45. Howard Shapiro was responsible for the financial proposals of Weigel and Texas 45. He believed that Weigel had always had sufficient

existing assets to fund all of the then-pending applications (Texas 45 Ex. 29 at 2-5; 12 Tr. 1587). Mr. Shapiro also testified that he knew, as a practical matter, that the cost of the projects would be significantly reduced by the investment tax credit and depreciation allowances; that the projects would generate substantial additional income for Weigel; and that Weigel would not likely be required to fund the projects immediately or simultaneously (Texas 45 Ex. 29 at 3-5). Shapiro also stated the following:

> I believed, and still believe, that Weigel's assets were sufficient to meet all reasonably anticipated costs, and thus I had no reason to conceal the proposals. In addition, I could have obtained a commitment of a bank loan had I realized that there could be any question concerning Weigel's financial ability. I had no reason to refrain from obtaining a bank letter evidencing a loan commitment. I certainly would have done so had I forseen the difficulties that the issue of funding the projects has caused in this proceeding. (Texas 45 Ex. 29 at 6).

46. With respect to the reporting in this proceeding of Weigel's commitments to the various proposals, Mr. Shapiro testified that he was aware that all of the proposals were matters of public record with the Commission and that the projects themselves were reported in the Rosenberg proceeding (Texas 45 Ex. 29, p. 6).[3]

Tomei v. Shapiro, et al.

47. On January 12, 1979, Davide Tomei filed the lawsuit captioned *Tomei* v. *Shapiro, et al.*, in the Circuit Court of Cook County, Illinois. Named as defendants in the suit were Howard Shapiro, Weigel, and J.W. O'Connor. Mr. Tomei, a Weigel shareholder, charged that Shapiro and O'Connor breached their fiduciary duties by allowing Weigel to use discriminatory advertising rates at WCIU to benefit Mr. Shapiro's non-broadcast business interests. Between January 12, 1979 (the date the lawsuit was filed) and July 30, 1980 (the date Pueblo filed the motion to enlarge issues raising the reporting question), Texas 45 did not amend its application to disclose the lawsuit in this proceeding.

48. The complaint in *Tomei* v. *Shapiro* alleged that C.E.T., Inc., a company in which Howard Shapiro held a substantial interest, had purchased advertising on WCIU at reduced rates; that "tradeout" purchases of WCIU advertising time were unaccounted for; and that these circumstances may have injured Weigel Broadcasting Company (Texas 45 Ex. 33 at 4-6). Tomei sought in the action an accounting for any

[3] The pendency of Weigel's STV application was referenced in Texas 45's application of December 1977. The grant of that application on February 22, 1980, was reported in a Texas 45 amendment filed on March 20, 1980. The December 30, 1979 grant of the transmitter move application was reported in a Texas 45 amendment filed on April 3, 1980. The April 24, 1980 filing of the translator application was reported in a Texas 45 amendment filed July 18, 1980.

losses to the company that may have occurred as a consequence of the C.E.T. advertisements and the tradeouts (Texas 45 Ex. 33 at 6-7).

49. The *Tomei* v. *Shapiro* lawsuit was described in the Consolidated Financial Statement of Weigel Broadcasting Company and Texas 45 as of March 31, 1979, which was sent to the approximately 300 shareholders of Weigel Broadcasting Company (Texas 45 Ex. 56, p. 9; 11 Tr. 1437 & 1440-2). The financial statement was also made available to members of the public who requested it (11 Tr. 1441-42). In addition, in August of 1980, Weigel filed with the Commission a proxy statement-prospectus in which the Tomei lawsuit was fully referenced and explained (Texas 45 Ex. 62, pp. 35-37, 46; 11 Tr. 1449-50). Finally, on January 25, 1979, shortly after the lawsuit was filed, Davide Tomei himself wrote to the Commission enclosing a copy of the complaint. On February 7, 1979, Mr. Arthur Ginsburg, Chief of the Broadcast Bureau's Complaints and Compliance Division, responded to Tomei's submission as follows:

> Upon a careful review of the material you sent, the matter discussed appears to involve a private controversy. The Commission does not attempt to resolve disagreements of this kind.
>
> Your interest in writing is appreciated.

50. Weigel Broadcasting Company is represented in matters relating to the Commission by the law firm of McKenna, Wilkinson & Kittner, and most especially by Mr. Thomas Frohock of that firm. At all relevant times, Texas 45 was represented in this proceeding by the law firm of Kirkland & Ellis. As soon as the *Tomei* v. *Shapiro* lawsuit was filed, Mr. Shapiro discussed that lawsuit with Mr. Frohock and sent to him a copy of the complaint (12 Tr. 1644). Shapiro dealt with Frohock rather than with Kirkland & Ellis because the claims involved were against Weigel Broadcasting Company, and McKenna, Wilkinson & Kittner represented Weigel. When asked if it had occurred to him that the existence of the lawsuit should have been disclosed to the Commission, Shapiro testified, "I relied on counsel for that kind of thing." (12 Tr. 1487). Shapiro assumed that if there was an obligation to report the lawsuit, counsel would see that it was done (12 Tr. 1489).

D. Coverage Map Issue

51. . Between 1967 and 1980, WCIU-TV on five occasions produced rate cards that included maps. Those rate cards were produced in 1967 (Texas 45 Ex. 15), 1971 (Texas 45, Exs. 16 & 71), 1973 (Texas 45 Ex. 17), 1976 (Texas 45 Ex. 18), & 1978 (Texas 45 Ex. 20).

52. The first rate card bearing a map is dated December 1, 1967 (Texas 45 Ex. 15). The map is a reduction of WCIU-TV's Calculated Horizontal Service Contours Map prepared by broadcast consulting engineer Davide E. Steel, Sr., in March 1967. No allegation is made that this map was distorted or misleading.

53. Two versions of a WCIU rate card which apparently became effective on October 1, 1971, are of record (Texas 45 Exs. 16 & 71). The maps that appear on the two versions are identical. The map contains four curves surrounding the City of Chicago. The three inner curves are labelled in rectangular boxes "City Grade," "Grade A", and "Grade B." The outermost curve is unlabelled (Texas 45 Ex. 16, p. 2). None of the lines shown on the 1971 rate card map correspond either in shape or in the area encompassed to the Grade A or Grade B contours shown on the Steel map (Texas 45 Exs. 13, 14, 16 19 & 71). The lines labelled "Grade A" and "Grade B" on the 1971 rate card map encompass a significantly greater area than do the Grade A and Grade B contours shown on the Steel map. The same is true of the area encompassed by the line labelled "City Grade" on the rate card map when compared to the city service contour on the Steel maximum service contours map (Texas 45 Exs. 13, 16 & 71).

54. The third WCIU-TV rate card with a map has an effective date of October 29, 1973 (Texas 45 Ex. 17). The map on this rate card is the same as the map on the October 1, 1971 rate card.

55. The next map appears on the WCIU-TV rate card effective June 1, 1976 (Texas 45 Ex. 18). This map also contains four curves surrounding the city of Chicago, with the two inner curves labelled, respectively, "Grade A" and "Grade B." The two outer lines are unlabelled.

56. The final WCIU-TV rate card bearing a map is dated January 1, 1978 (Texas 45 Ex. 20, p. 1). The map on this rate card is nearly identical to the one on the June 1, 1976 WCIU-TV rate card, with four curves surrounding Chicago, the inner two curves labelled "Grade A" and "Grade B", while the outer two curves are unlabelled.

57. The unlabelled lines on the rate card maps do not correspond to any known predicted or WCIU contours. None of the labelled lines on the rate card maps correspond to WCIU's contours as predicted in accordance with Commission rules in effect at the time that the ratecards were in use.

58. WCIU's present sales manager, Robert Ward, was not employed at the station prior to 1974, and he had no knowledge of how the 1971 rate card or the map appearing on it originated (Texas 45 Ex. 1 at 1, Tr. 407). Howard Shapiro did not take on day-to-day responsibility for WCIU's affairs until July of 1973 and had no memory of the 1971 rate card, no knowledge concerning the origin of the 1971 rate card map, and no knowledge of the manner in which the map came to be placed on the rate card (Texas 45 Ex. 2 at 1; 9 Tr. 947, 966-67, 975-81 & 1102). Shapiro contacted J.W. O'Connor, Weigel's former president and the person in charge of station affairs when the 1971 ratecard was produced, but O'Connor had no memory of the rate card or the rate card map (9 Tr. 1014). The station's Chief Engineer since 1967, Richard Ashenfelter, also had no knowledge concerning the origin of the map on the 1971 rate card.

(7, Tr. 619).[4]

59. Bruce Newton knew very little about the 1971 rate card map. Newton was an artist who worked at the station between the years 1964 and 1974 (10 Tr. 1139; Texas 45 Ex. 2 at 2). Newton testified that he had personally designed the 1971 rate card, that he had "put the map in there", but that he had not drawn or originated the map himself (10 Tr. at 1145). Newton could not remember where he had gotten the map. Newton testified that he did not draw the map on the 1971 rate card or on any other rate card (Trs. 1145, 1147, 1150, & 1216-17).

60. With respect to the 1976 rate card, Susan Rhyne, who was art director at WCIU between 1975 and 1980, testified that the map used to produce the 1976 rate card map came to her attention in the art department (Tr. 1229), that she did not remember who gave it to her (Tr. 1235), but that she thought it had come from the sales department (Tr. 1228-29). When she received the map, all four circles were already on it and the copy of the map she received was camera ready (Tr. 1234). She said that camera ready art could only have been produced by the art department or by the station's outside printer (Tr. 1235).

61. The 1978 rate card contains a map which appears to be identical to the map on the 1976 rate card. Howard Shapiro stated his belief to be that the 1978 map was copied directly from the 1976 rate card (Tr. 1040-41). Ms. Rhyne also testified that the 1976 rate card map was used on the 1978 rate-card (Tr. 1234).

62. The evidence shows that only one member of the WCIU sales staff had ever used the rate card maps to illustrate station coverage in dealings with advertisers or potential advertisers. That person was Mary Beth McCabe, who worked at the station during the effective period of the 1978 rate card. McCabe testified that she may have referred to the 1978 rate card map in two or three letters per month during the fifteen months of her tenure in which the 1978 rate card was effective (Tr. 711-12). However, a subsequent review of her complete correspondence file revealed a different picture. WCIU discontinued use of the 1978 rate card as of June 1, 1980, so McCabe could not have referred to the 1978 rate card map after that date. She wrote approximately 320 sales letters prior to June 1, 1980 (Texas 45 Ex. 91). Out of that total of 320 letters, she referred to the rate card map in only one or, possibly, two of the letters (Texas 45 Ex. 91). McCabe believed the map to be accurate, and she was not instructed by anyone to use the map (Texas 45 Ex. 5, pp. 1-2; Tr. 710).

63. Sales manager Robert Ward, who worked at the station either as a salesperson or as sales manager during the effective periods of the 1973,

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[4] Ashenfelter also had no knowledge concerning the origin of any of the other rate card maps (7 Tr. 616-19, 622, & 625-27). O'Connor similarly had no memory of any of the rate card maps (9 Tr. 1014).

1976 and 1978 rate cards, never used a rate card map to illustrate station coverage (Tr. 421-422; 429; & 752; Texas 45 Ex. 1). All of the current WCIU sales staff who were employed at the station during the times in which the disputed rate cards were used testified that they had never been instructed by Robert Ward, Howard Shapiro or anyone else to use the rate card maps to illustrate station coverage (Tr. 317; 686 & 717; Texas 45 Ex. 3, o. 2; Texas 45 Ex. 4, p.1; Texas 45 Ex. 5, p. 1). Much evidence was adduced concerning some WCIU promotional pieces on the theory that inaccuracies in them might lend inferential support to a finding that the rate card maps had been intended to mislead advertisers. The evidence is summarized in the following paragraphs.

64. One promotional piece in use at WCIU-TV was a page stating in bold lettering the following:

> VIDEO POWER - OVER 1 MILLION WATTS
> AUDIO POWER - 174,000 WATTS
> PRIMARY SIGNAL RANGE - 72 MILES
> (Texas 45 Ex. 1, p. 105).

The 72-mile figure appears to have originated with a former salesperson at WCIU, Mr. Gene Holland. At some point during his tenure at the station, Holland prepared a written sales presentation that showed demographic information for the Chicago Hispanic market and that included the following statements: "Physical Size of Market: In square miles, the Chicago market covers 71.8 square miles, distributed in 58 areas of concentration in the City of Chicago" (Tr. 360-62, & 391). The document also referred to the market size as "71.8% square miles" (Tr. 362). In 1974, Holland wrote several letters to advertisers in which he referred to the "71.8 mile Grade B Contour" of WCIU's signal; said "the dominant Grade B Contour of WCIU-TV's signal reaches out 71.8 miles;" and said that the station reached throughout a "72 mile radius of the Chicago area" (Pueblo Ex. 2 at 2, 4 & 6).

65. Robert Ward saw Holland's sales presentation containing the 71.8 square-mile figure shortly after Ward had begun work at the station in 1974 (Tr. 367-69). He also heard Holland use the 71.8 or 72 mile figure in conversation (Tr. 367 & 70; Texas 45 Ex. 1 at 19-20). Ward used the 72-mile figure in his sales efforts. He used it in promotional packages that he distributed at an annual convention of religious broadcasters each January from 1978-81 (Texas 45 Ex. 1, pp. 19-30). Ms. McCabe testified that she also distributed the page referring to the 72 mile primary signal range to various advertisers (Tr. 736). Also, Ms. McCabe verbally informed clients that the signal range of WCIU-TV was 72 miles about "twice a month." Ms Davida Simon also advised potential advertisers that the station's signal reaches out 72 miles. In fact, WCIU-TV's Grade B contour does not extend 72 miles. Rather, based on the station's official

coverage map filed with the Commission in 1976 (Texas 45 Ex. 19), that contour extended between 30.0 and 38.9 miles (Pueblo Ex. 21, p.1; Tr. 266-67).

66. As indicated, Ward included the 72-mile figure in promotional packages that he developed to sell religious programming on the station. These references characterize the station as having "a primary signal range" of 72 miles. In each of these packages, however, the Steel map was also included (Texas 45 Ex. 1, p. 109; Pueblo Ex. 2, p. 25; Pueblo Ex. 22, p. 3; Tr. 575 & 603). The Steel map contained a mileage scale, shows the station's calculated Grade B contour, and thus indicates that that contour does not extend 72 miles from the transmitter. Ward testified that he would have abolished use of the 72 mile figure instantly had he known that it was in error (Tr. 849). He also stated that he had never knowingly misrepresented WCIU's coverage and had no reason to believe that any other salesperson had done so (Texas 45 Ex. 1, p. 20).

67. Both Ms. Simon and Ms. McCabe apparently either heard the 72 mile figure from Ward or saw it on the religious promotional package Ward had prepared (Texas 45 Ex. 4, p. 1; Tr. 683-84 & 735-36). Ms. Simon told advertisers on three or four occasions that the station's signal "reaches out 72 miles," without considering whether the 72-mile figure represented the radius or the diameter of the signal area (Tr. 681-83). When asked what she had meant by "reaches out 72 miles," Ms. Simon confessed to her confusion, saying: "Do you want me to be honest ... I don't know what I was talking about. It's something I heard. My technical knowledge is very limited" (Tr. 699). Ms. Simon believed when she used the 72-mile figure that it was accurate (Tr. 690).

68. Apparently, Ms. McCabe did not learn until she testified at the hearing that the 72-mile figure was inaccurate (Tr. 736-37). When asked about the figure, McCabe stated: "To my knowledge that's the signal coverage area" (Tr. 336). She was surprised that the figure was being questioned and plainly showed that she had fully believed the figure to be correct (Tr. 735-38). When asked how she would describe the station's coverage area at present, McCabe said: "Chicago. We cover Chicago. That is a very simple way to state the coverage area, the city of Chicago and the metropolitan area." (Tr. 725).

69. Another piece of promotional literature in use at WCIU-TV had to do with the Stock Market Observer (SMO) program. The sheet is captioned: "The Stock Market Observer is Viewed Everywhere!" (Pueblo Ex. 2, p. 17). Below the caption is a list of 215 Illinois communities, 34 Indiana communities, 2 Iowa communities, 10 Michigan communities and 12 Wisconsin communities. Below the list is the following explanation:

> The preceding list represents almost 4,000 postmarks in response to the Merrill Lynch STOCK GUIDE offer. Responses from these towns were in addition to over 1,300 within Chicago city limits. SMO is seen on 84 known cable systems outside

normal signal — in addition postmarks from 23 other states from California to New York were received which indicates apparent viewing from Chicago hotels of visiting businessmen.

70. There are no inaccuracies in this promotional piece which could possibly form the basis for any kind of any unfavorable inference regarding the coverage map issue. It does not misrepresent anything. It states that it lists communities from which mail responses were received to a Stock Guide offer carried on WCIU's Stock Market Observer program, and that is what it lists. There is no question about whether the listed communities are in fact those from which responses were received by WCIU. The piece is accurate.

71. Another promotional piece appears on a WCIU-TV letterhead below which the following heading is stated:

CABLE COVERAGE UNMATCHED BY ANY OTHER MIDWEST UHF (Texas 45 Ex. 1, p. 112; Pueblo Ex. 2, p. 18).

72. The next item on the page is a list of communities with the heading *"84 Cable Systems Carry Channel 26 in Five States."* The five states listed are Illinois, Indiana, Michigan, Wisconsin, and Iowa. This document was provided to the WCIU-TV sales staff and was distributed to potential advertisers (Texas 45 Ex. 1, p. 112; Texas 45 Ex. 69; Pueblo Ex. 2, pp. 13, 18, 23; Pueblo Ex. 22, p. 6; Tr. 495).

73. The statement that WCIU-TV's cable coverage is unmatched, in terms of carriage, by any other midwest UHF station is not true. In fact, WCIU-TV trailed two other UHF stations in Chicago alone for each of the years upon which the cable coverage document was based or during which it was used.

74. The promotional sheet was prepared by Robert Ward and WCIU's Assistant Manager Peter Zomaya in 1977, and it bears the date "June 1977" Pueblo Ex. 2, p. 18; Texas Ex. 1, p. 112). The list of cable communities on this sheet was compiled from two sources. The first source was a mailing made by WCIU in approximately March or April of 1977 to cable systems in Illinois, Indiana, Michigan, Wisconsin and Iowa (Trs. 480-82). WCIU had obtained from the FCC a list of cable systems in those states and had used the names and addresses on that list to make the mailing (Tr. 493). The mailing contained a questionaire that the cable systems were asked to fill out and return to the station which included questions about whether the cable system was then carrying any of WCIU's programming (Tr. 480-81). Cable communities that were indicated by the responding cable system operators to be receiving WCIU programming were then placed on the promotional sheet on the basis of the responses (Tr. 41-82; 931).

75. The second source for the communities on the cable carriage sheet was a running compilation that the station had maintained of cable

communities that the station had been informed received WCIU programming via cable (Tr. 41-84). This compilation was based on notifications from cable systems indicating an intent to carry WCIU's program schedule for local publication (Tr. 481-84 & 508-09).

76. A total of 84 cable communities were indicated to be receiving WCIU programming via cable either by the questionaire responses or by notification of carriage that had been sent to the station, and those communities were listed on the cable carriage sheet (Tr. 508-09). No community was placed on the list unless it had been identified as receiving WCIU via cable either in a questionaire response or in a notification of carriage.

77. After this list of 84 cable communities had been compiled, Mr. Ward consulted Broadcasting Yearbook for comparison purposes to determine how WCIU ranked as against other UHF stations in terms of cable coverage (Tr. 472, 480, 486, 490; & 863-64). Mr. Ward was unable to recall specifically whether he had consulted the 1975, 1976 or 1977 volume of Broadcasting Yearbook (Tr. 490-91; 863-64). He did consult Broadcasting Yearbook listings for UHF stations in Chicago and Milwaukee, but he was unsure whether he had looked at entries for stations in other cities (Tr. 490; 864). Neither the 1977, 76, 75 or 74 Editions of Broadcasting Yearbook contained information about WCIU's cable carriage. According to the 1977 Edition of Broadcasting Yearbook, the highest cable carriage listing for a UHF station in Chicago or Milwaukee is a listing of 77 CATVs carrying WSNS in Chicago (Texas 45 Ex. 65, p. 1; Texas 45 Ex. 70, p. 5). The same is true of the 1976, 1975 or 1974 Editions of Broadcasting Yearbook, which also show the highest listing as 77 CATVs carrying WSNS (Texas 45 Ex. 66, p. 1; Texas 45 Ex. 67, pp. 1-2; Texas 45 Ex. 68, pp. 1-2; Texas 45 Ex. 70, pp. 2-4). In this situation, Ward concluded that WCIU's carriage into 84 cable communities was unmatched by any other mid-west UHF station.

78. Ward was unaware of any inaccuracy in the piece when he prepared it (Tr. 471-72, 509, & 862). Ward cautioned advertisers that the promotional piece had been prepared in 1977, as the date it bore indicated, and that he did not know whether the information on it remained urrent (Texas 45 Ex. 69, Tr. 875-76, 879-80 & 884-90). In fact, the sheet had at all times since it was prepared understated the number of cable communities that apparently received WCIU via cable. The list contained 84 communities, whereas WCIU was apparently carried on cable in approximately 94 communities in 1976, 89 communities in 1977, 100 communities in 1978, 111 communities in 1979, 102 communities in 1980, and 171 communities in 1981-82 (Texas 45 Ex. 92, pp. 7, 29, 54, 83, 114 & 147-48).

79. Mr. Shapiro stated that, "I have never until this matter was raised in the Rosenberg proceeding in May of 1980 had any discussions with

WCIU personnel concerning the manner or method of representing WCIU's coverage area to advertisers or potential advertisers" (Texas 45 Ex. 2, p. 7). Mr. Ward also stated that "[p]rior to 1980 and 1981, I received no instructions from Howard Shapiro or any other WCIU officer or employee concerning the manner in which I or other WCIU salespersons are to represent WCIU's coverage area. Prior to 1980 and 1981, I had no conversations with Howard Shapiro concerning the representation of WCIU's coverage area" (Texas 45 Ex. 1, p. 21). Similarly, WCIU-TV's salespersons Kenneth Shapiro, Davida Simon, and Mary Beth McCabe all stated that they never had any conversations with Howard Shapiro concerning how to represent the station's coverage (Texas 45 Ex. 3, p. 2; Texas 45 Ex. 4, p. 1; Texas 45 Ex. 5, p. 1). Howard Shapiro was not involved in the creation, approval or use of the coverage maps. He had no knowledge of those matters and took no part in them.

80. Pueblo Broadcasting Corporation raised the question about the rate card maps in April 1980; Howard Shapiro instructed Robert Ward to cease use of the 1978 rate card in May of 1980, and a new WCIU rate card containing no map was printed and became effective on June 1, 1980 (Texas 45 Ex. 2, pp. 7 & 10; Texas 45 Ex. 1, pp. 2-3, & 33; Texas 45 Ex. 21).

Conclusions

Employment Discrimination Issue

81. Section 73.2080 of the Commission's Rules, 47 CFR Section 73.2080, states that "no person shall be discriminated against in employment because of race, color, religion, national origin or sex." It is plain that WCIU, its management, and Weigel Broadcasting Company did not discriminate against Rhea Hammer on the basis of her sex or on any other basis. The finding of sex discrimination by the FEPC hearing examiner appears to have been based solely on Hammer's statement that O'Connor had told her that male Hispanics at the station objected to her appointment because she was a woman. O'Connor denied having said such a thing, and the other station personnel denied objecting to Hammer on any such basis. The evidence demonstrates a history of conflict between Rhea Hammer and several other employees at WCIU with whom she came into contact. The employees who testified stated uniformly that they had not objected to Hammer's appointment because of her sex. Indeed, one of the persons who objected to Hammer was Lilly Acala as the Executive Director of Spanish Programming, herself a woman.

82. Although there was a finding of discrimination on the basis of sex entered against Weigel Broadcasting Company, the finding was isolated, was not based upon any pattern or practice of the company, and was not in any sense indictative of the policies or hiring practices of the company. Moreover, the finding appears to have been made on the basis of a record

that did not support it. Finally, the motivating factor behind the alleged discriminatory action was not invidious, but was the entirely understandable aim of attempting to retain WCIU's valued Spanish language department employees, while at the same time retaining Rhea Hammer as a station employee. The adjudication of sex discrimination, given the circumstances on which it was based, is of no comparative importance whatsoever. No demerit will be assessed against Texas 45 on this account.

Section 1.65 issue

83. The first aspect of this issue concerns Texas 45's failure to report various Weigel financial commitments that were proposed to be met from the same resources on which Texas 45 relied in this proceeding.

84. No evidence indicates that Texas 45 either concealed or intended to conceal the various financial proposals. All of those proposals were of public record with the FCC. There was no motive to conceal the proposals. Weigel could have obtained a bank loan commitment had there been any uncertainty about its ability to fund the proposals.

85. Weigel was at all relevant times quite able to meet its commitment to Texas 45. As a consequence, the existence of the financial proposals has proved to be of no decisional significance whatsoever.

86. The *Tomei* v. *Shapiro* aspect of this issue is also of no consequence.

87. The nature and existence of the lawsuit was not kept secret. It was described in public documents which were sent to shareholders of Weigel Broadcasting Company and to members of the public who requested those documents. Additionally, the Tomei lawsuit was fully referenced and explained in a proxy statement-prospectus that Weigel filed with the Commission. Then, shortly after the lawsuit was filed, Davide Tomei sent to the Commission a copy of the complaint, and the Commission expressed no interest in the matter.

87A. Howard Shapiro had no intention to conceal the *Tomei* v. *Shapiro* suit, and he did not conceal it. He relied on communications counsel to report the suit if reporting was necessary. As soon as that lawsuit was filed, Mr. Shapiro discussed the matter with communications counsel and sent him a copy of the complaint. He had no knowledge that the *Tomei* v. *Shapiro* lawsuit, which named Weigel Broadcasting Company as a defendant and related to WCIU-TV, had any relevance to Texas 45's Rosenberg application.

88. The conclusion is that there was no concealment and no intention to conceal or mislead concerning the *Tomei* v. *Shapiro* suit. Also, that lawsuit had no decisional significance in this proceeding. No comparative demerit could possibly be assessed against Texas 45 under this aspect of the Section 1.65 issue.

89. Trial of this entire issue has demonstrated that: (1) there was no concealment or deception with respect to the unreported information; (2) the unreported information is also ultimately of no decisional significance in the proceeding. Consequently, consistent with *Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210 (Rev. Bd. 1982), no comparative demerit will be assessed.

Coverage Map Issue

90. The evidence shows that current WCIU management did not create or approve the rate card maps and were unaware of any inaccuracy in any of them. None of the current WCIU management participated in the creation of the maps or approved them for inclusion on the cards for use by station personnel. The maps were almost never used for any purpose. They were not used in connection with any statement of populations served or claim of service to areas encompassed within the lines on the maps. There is no showing that the coverage maps were intended and used in a deliberate scheme to mislead or to defraud advertisers. The rate card maps were never used or referred to for any purpose by WCIU salespersons Ward, Simon, and Ken Shapiro. The rate card maps were referred to very infrequently and in apparent good faith by salesperson McCabe, and she referred to a rate card in only one or, possibly, two letters in her entire sales correspondence. She believed the maps that she used to be accurate, and was not instructed by anyone to use the map.

91. None of the evidence concerning the WCIU promotional pieces supports in any way a conclusion that the rate card maps were used or intended to mislead advertisers. First, there was no inaccuracy in one of them. Then, the cable carriage piece was believed in good faith by Robert Ward to be accurate. There was no correlation between the communities listed on the promotional piece and the areas within the circles on the rate card maps, and there appears to be no connection whatever between the two. Ward's explanation of how the sheet was prepared is credited here. It shows only that any error in the sheet was wholly inadvertent.

92. The promotional piece containing the 72-mile signal range representation was used by Robert Ward in his sales efforts. The evidence shows that he used the figure in good faith, believing it to be accurate. In the promotional packages that he developed to sell religious programming on the station, claiming that the station had a "primary signal range" of 72 miles, he included a copy of the Steel map, which showed that the station's Grade B contour does *not* extend 72 miles from the transmitter. It appears that Ward simply learned the 72-mile figure from a predecessor in the station's sales department and erroneously assumed that it was correct.

93. Ms. McCabe's testimony shows her good faith belief that the 72-mile figure was accurate. It wasn't until the hearing that she learned that the 72-mile figure was not accurate. Her understanding was imply that the station covered the "City of Chicago and the metropolitan area." All that this evidence shows is that the WCIU salespersons were sometimes in error with respect to their statements and understandings concerning the station's coverage. However, their errors were unintentional, and resulted both from their inexact conceptualizations of coverage and their good faith reliance on inherited practices. Neither disqualification or a comparative demerit is warranted on the basis of the evidence.

Standard Comparative Issue

94. The television station proposed by Pueblo would, if granted, be the corporation's only broadcast interest. The .59 percent interest of Gaston Ponce, a 1 percent Pueblo stockholder, in Radio Station KLAT is decisionally insignificant, particularly in light of the passive nature of his holding, its fractional amount, and the number of other media voices that serve the same area. Pueblo stockholders have no other media interests.

95. Weigel Broadcasting Company owns 100 percent of the issued and outstanding stock of Texas 45. Weigel is the licensee of television station WCIU-TV, Chicago, Illinois. Weigel also operates television translator station W55AS in Milwaukee, Wisconsin. Pueblo Broadcasting Corporation is entitled to a substantial preference under the diversification criterion of the standard comparative issue.

96. Pueblo is entitled to 35 percent full-time quantative integration based on the proposal of 35 percent stockholder Alfonso C. Pena to serve as full-time general manager of Pueblo's proposed station. Pueblo's integration is augmented by the 30 hour per month part-time commitment of its 24.25 percent shareholder and president Jose Adan Trevino. The record contains no evidence that any Texas 45 principal will devote a minimum of 20 hours per week to the proposed station's affairs. Consequently, Texas 45 is entitled to no credit for the integration of ownership into management.

97. A weighing of qualitative enhancement factors is unnecessary in this case. Pueblo is entitled to a substantial preference on the criterion of integration of ownership and management.

Ultimate Conclusions

98. Although both applicants are fully qualified to be Commission licensees, Pueblo is preferred under the standard comparative criteria in this case. In contrast to Texas 45, neither Pueblo nor any of its principals has any significant broadcast or other media interests. Also, Pueblo's integration proposal is clearly superior to that of Texas 45. The result is

clear even without consideration of any of the qualitative enhancements that accrue to Pueblo's proposal.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision IS TAKEN by a party or IT IS REVIEWED by the Commission on its own motion, the application of Pueblo Broadcasting Corporation IS GRANTED and the application of Texas 45 Broadcasting, Inc. IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

[5] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276(d) of the Commission's Rules.

Diversification, of Control of Mass Media
Operation Interim
Ownership and Management, Integration of
Power Equipment Auxiliary

In ninety-day expedited proceeding, Review Board selected merged applicant for interim operation in San Diego. Preferences awarded to winning applicant for diversification, integration, and auxiliary power exceeded those given to its competitors.
—*Reginald A. Fessenden Educational Fund, Inc.*
MM Docket No. 84-972

FCC 85R-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
The Reginald A. Fessenden Educational Fund, Inc.	MM Docket No. 84-972 File No. BPHI-800905AE
Ronald Kent Galon	MM Docket No. 84-973 File No. BPHI-840725IA
Pan-American Broadcasting Corporation	MM Docket No. 84-974 File No. BPHI-840726IA
San Diego Symphony Association	MM Docket No. 84-975 File No. BPHI-840726IC
Rosalee Sell and Mary F. Sorrentino	MM Docket No. 84-976 File No. BPHI-840727IC

San Diego State University Foundation	MM Docket No. 84-977 File No. BPHI-840727IS
Jubilee Public Broadcasting	MM Docket No. 84-978 File No. BPHI-840727JE
Ethel M. Mike	MM Docket No. 84-979 File No. BPHI-840727JF
San Diego Seniors in Action Network	MM Docket No. 84-980 File No. BPHI-840727JP
For Interim Authority to Operate the Facilities of Station KIFM(FM) San Diego, California	

Appearances

William J. Byrnes, John P. Crigler, and *Lorenzo W. Milam,* on behalf of The Reginald A. Fessenden Educational Fund, Inc.; *Richard R. Zaragoza, David D. Oxenford,* and *Janice C. Orr,* on behalf of Ronald Kent Galon; *Lewis I. Cohen* and *Roy W. Boyce,* on behalf of Pan-American Broadcasting Corporation; *Heidi P. Sanchez* and *Jerome S. Boros,* on behalf of San Diego Symphony Association; *Alfred C. Cordon* and *Dennis J. Kelly,* on behalf of Rosalee Sell and Mary F. Sorrentino; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin,* on behalf of San Diego State University Foundation; *Aaron Shainis* and *Lee J. Peltzman,* on behalf of Jubilee Public Broadcasting; *Howard M. Liberman, Ernest T. Sanchez,* and *Roger P. Furey,* on behalf of Ethel M. Mike; and *J. Richard Carr,* on behalf of San Diego Seniors in Action Network.[1]

DECISION

Adopted: January 24, 1985; Released: January 30, 1985.

[1] Attorneys Liberman, Ernest T. Sanchez, and Furey also appeared on behalf of the merged entity, KIFM Partners.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This is a special comparative proceeding to select an interim operator for the facilities of former Station KIFM(FM), San Diego, California.[2] Nine applicants responded to the Commission's June 15, 1984 (FCC 84-279) invitation to apply for interim operating authority, and by *Hearing Designation Order (HDO)*, Mimeo 494, released October 26, 1984, the applications of The Reginald A. Fessenden Educational Fund, Inc. (Fessenden), Ronald Kent Galon (Galon), Pan-American Broadcasting Corporation (Pan-American), San Diego Symphony Association (Symphony), Rosalee Sell and Mary F. Sorrentino (S&S), San Diego State University Foundation (Foundation), Jubilee Public Broadcasting (Jubilee), Ethel M. Mike (Mike), and San Diego Seniors in Action Network (Seniors) were designated for oral argument before the Review Board on the standard comparative issue. A prehearing conference took place on November 20, 1984, and oral argument was heard on January 7, 1985. We have reviewed the parties' comparative showings submitted November 15, 1984, their opening and reply briefs filed December 12 and 28, 1984, respectively, the oral argument, and the other submissions made pursuant to discovery in this case. On the basis of this record we conclude that KIFM Partners, a merged entity derived from Mike and S&S, is the best applicant on a comparative basis to serve as interim operator of KIFM's facilities.

Preliminary Matters

2. *Dismissals and Merger.* Since hearing designation, five of the original nine applicants have sought permission to merge, settle, or have their applications dismissed. We have encouraged such measures from the outset (Tr. 42) as a means of streamlining this 90-day expedited proceeding (*HDO*, para. 6). First, we will dismiss Symphony's application on the basis of its avowed non-participation in the comparative process herein

[2] West Coast Media, Inc. (WCM) was KIFM's licensee. On July 24, 1980, the Commission denied WCM's application for renewal of license. *West Coast Media, Inc.*, 79 FCC 2d 610, 47 RR 2d 1709 (1980), *recon. denied*, 86 FCC 2d 331, 49 RR 2d 623 (1981). That decision was affirmed by the U.S. Court of Appeals in *West Coast Media, Inc.* v. *FCC*, 695 F. 2d 617 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 74 (1983). Subsequently, the Commission denied a request for permission to sell the station on a distress sale basis but has allowed WCM to continue operation of the station pending selection of an interim operator. *West Coast Media, Inc.*, 56 RR 2d 483 (1984). On November 28, 1984, The Reginald A. Fessenden Educational Fund, Inc. filed a petition to revoke WCM's pre-interim operating authority and substitute itself as the temporary operator. That petition is still pending before the Commission and will not be addressed herein.

and its announced intention of seeking dismissal of its application. Symphony's December 12, 1984 letter to Review Board, at 1; Section 73.3568(b) of the Commission's Rules, 47 CFR 73.3568(b). Second, we will grant Foundation's January 2, 1985 request that its application be dismissed with prejudice, pursuant to Section 73.3568 of the Rules, 47 CFR 73.3568, without payment or promise of consideration. Finally, on December 6 and 13, 1984 and January 3, 8, 14, and 16, 1985, Mike, S&S, and Galon filed a series of pleadings which, taken together, embody a joint request for approval of a merger proposal and settlement agreement. The documents, which are unopposed (see note 6, *infra*), call for the dismissal of Galon's application in return for $10,000; the dismissal of S&S's application in return for Rosalee Sell and Mary Sorrentino obtaining an interest in a new merged applicant entity; and the conversion of the Mike application into that new entity, KIFM Partners (Partners), a California general partnership in which Ethel Mike will hold a 50% general partnership interest and Sell and Sorrentino will each hold a 25% general partnership interest. We find that the proposed merger is a *bona fide* one and should be permitted. *See Joseph Bahr,* 92 FCC 2d 114, 117, 52 RR 2d 996, 998 (Rev. Bd. 1982), *modified sub nom. Global Broadcasting Group, Inc.,* 94 FCC 2d 809, 54 RR 2d 404 (Comm'n 1983). In accordance with established precedent in these special interim cases, this merger will not invoke the usual prohibition against the upgrading of comparative cases because all parties were given express notice at an early stage (the November 20, 1984 prehearing conference — Tr. 38-42) that post-cutoff date mergers were encouraged and would not be subject to upgrading objections. *See Phoenix Media Corp.,* 56 RR 2d 1241, 1243 n. 4 (Rev. Bd. 1984). We will also approve the proposed settlement agreement and the dismissal of Galon's and S&S's applications.

3. *Discovery Motions.* By Order, FCC 84R-83, released November 27, 1984, the Board held in abeyance Pan-American's notices of intent to take depositions upon oral examination of certain applicants' principals, pending our review of the answers to written interrogatories and requests for document disclosure, the two forms of discovery that we did authorize. What ensued was a largely unproductive avalanche of interrogatories, motions for production of documents, objections, requests for protective orders, interrogatory answers, document disclosures, and motions to compel. While this forensic *tour de force* technically comported with the Commission's discovery rules, it proved unwieldy within the confines of our 90-day proceeding and caused us to reschedule the dates for reply briefs and oral argument in order to allow the parties and the Board to assimilate the discovery products and take full account of them. Order, FCC 84R-91, released December 13, 1984. In retrospect the Board doubts that discovery can be employed effectively amongst so many parties in

such a short period of time. Consistent with our broad authority to supervise the use of discovery procedures and the power to ensure efficiency and fairness and to curb abuses, *see Discovery Rules in Adjudicatory Proceedings*, 91 FCC 2d 527, 52 RR 2d 913 (1982), we will quash Pan-American's deposition notices and deny Mike's December 11, 1984 motion to compel answers to some of its interrogatories. Enough is enough![3]

Comparative Evaluation

4. *The Applicants.* The five remaining applicants are as follows: *Fessenden* is a non-profit, tax exempt corporation organized under the laws of the State of California in February 1972 for the purpose of operating a non-profit educational fund. It is governed by an 11-member board of directors: Karyn Alice Baker, Donald Campau, Douglas Cruickshank, Laura Daltry, Elizabeth Gips, Joseph Griffin, Cese McGowan, Kevin E. Milam, Lorenzo W. Milam, Patrick C. Sheehan, and Judith Williams. Baker and the Milams are also officers of the corporation. Fessenden FCC Form 301, Section II, page 2. *Pan-American* is a California non-stock, not-for-profit corporation governed by five directors, each of whom has one vote. The directors are Margarita L. Alvarez, Roberto Izabal, David C. Lizarraga, David Robles, and Gloria Valencia. Pan-American Exh. 1. *Jubilee* is a California limited partnership. The general partner is Elaine Priscilla Ford (Martinez), who owns 20% of the partnership. The limited partners, each of whom owns 11.43% of the partnership, are William P. Austell, Jr., Stephen Little, Vincent Master, Daniel Forrestall, Mark Samuel Martinez, Evelyn Beatrice McDermott, and Doris Annette Jimison. Jubilee Exh. 1. As previously indicated in paragraph 2, *supra, Partners* is a California general partnership in which Ethel Mike holds a 50% general partnership interest and Rosalee Sell and Mary Sorrentino each hold a 25% general partnership interest. *Seniors* is a California non-profit, non-stock unincorporated association having classes of voting and non-voting support membership. The voting members, officers, and directors are: Kenneth Cowan, 50.5% voting member, president, and director; Margaret Helton, 16.5% voting member, vice president, and director; Anne Fabrick, 16.5% voting member, treasurer, and director; and Avis Johnson, 16.5% voting member, secretary, and director. Seniors Exh. 1, p. 1. Our comparative evaluation of the applicants is guided by recent Commission interim authorization precedent — *Global Broadcasting Group, Inc., supra, modifying Joseph Bahr, supra; Angeles Broadcasting Network*, 56 RR 2d 149 (Rev. Bd. 1984); and

[3] We will grant Fessenden's December 11, 1984 request for dismissal of its December 7, 1984 motion to compel S&S to answer some of Pan-American's and Mike's interrogatories.

Phoenix Media Corp., supra — and by the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 5 RR 2d 1901 (1965).

5. *Diversification of Control of Mass Media.* Partners has no other media interests nor do its principals. However, Fessenden's 9% "owner," Lorenzo Milam, owns 16.9% of Low Power Technology, Inc., a publicly traded corporation that has been awarded construction permits for nine low power television stations in Anchorage, Alaska; Lawrence and Topeka, Kansas; Polk City, Iowa; Malcolm, Nebraska; Columbia, Missouri; and Reno, Nevada. Fessenden January 8, 1985 amendment, Attachment B, p. 2.[4] Pan-American's 20% "owner," David Lizarraga is a 1% stockholder (but not an officer or director) in Miami Cable Company, which has a franchise to operate a cable television system in Miami, Florida. Pan-American Exh. 4, p. 4. Jubilee limited partner Daniel Forrestall served as general manager of Stations KYLO(FM), Davis, California, and KHIP(FM), Hollister, California, from 1979 until November 1984 — after the "B" cutoff date in this proceeding (September 18, 1984) — but had no ownership interest in either station. Jubilee Responses to Pan-American Interrogatories at 5; Jubilee Reply Br. at 8. Finally, Seniors' 50.5% voting member Kenneth Cowan has an 8.5% ownership interest in Station KZTR(FM), Camarillo, California, located about 155 miles from San Diego, and he is also president, secretary, and treasurer of the licensee and general manager of the station. In addition, Cowan's brother, Charles Cowan, owns 58.5% of the licensee and is its vice-president; the two brothers provided financing for the station's purchase and operations out of their personal savings and a family trust in which they are the sole trustees and ultimate beneficiaries; and Kenneth Cowan is the licensee's "managing shareholder" under a 1981 shareholders agreement. Seniors Exh. 2, p. 1; Mike Exhs. A and B.

6. *Global Broadcasting Group, Inc., supra,* makes it clear that the diversification criteria of the *Policy Statement* are applicable in interim authorization comparisons. Thus, the appropriate weight to be given other media interests is directly related to the type of media, size of ownership interest, proximity of media to applicant's proposed community of license, significance of media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective localities. *Policy Statement, supra,* 1 FCC 2d at 395, 5 RR 2d at 1909. Using these

[4] Milam resigned as chairman and director of Low Power Technology, effective December 31, 1984, but apparently has retained his stock ownership. Fessenden January 8, 1985 amendment, Attachment A, p. 1. In any event, for comparative purposes Fessenden will be deemed to have a 1.5% attributable interest in these LPTV stations by virtue of Milam's present (or past) ownership interest. The nearest community (Reno) is some 300 miles from San Diego. Fessenden Br. at 16.

guides we conclude that Pan-American's minute attributable cable television interest is not decisionally significant here, but that Fessenden's attributable LPTV interests are cognizable and warrant a very slight diversification "demerit" in view of the greater ownership percentage, greater number of facilities, and the fact that LPTV stations are distinguished from passive translator stations by their extensive program origination capability. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 988, 55 RR 2d 926, 929-30 (1984); *Colorado Television, Inc.*, 56 RR 2d 1080, 1087-88 (Rev. Bd. 1984); *Low Power Television Service*, 51 RR 2d 476, 519 (1982). We also hold that Jubilee deserves a very slight diversification "demerit" because of Forrestall's post-cutoff date significant managerial positions in two in-state FM stations. *Policy Statement, supra*, 1 FCC 2d at 394 n. 5, 5 RR 2d at 1908 n. 5; *Thomas C. and Essie L. Collins*, 93 FCC 2d 467, 468-69, 53 RR 2d 219, 221 (Rev. Bd. 1983); *cf. Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 224, 55 RR 2d 1326, 1335 (Rev. Bd. 1984) (media interests in the same service as the subject applications are more significant *per se* than other media holdings). The magnitude of this "demerit" would be greater but for the fact that Forrestall is only a limited partner in Jubilee. *See Greater Wichita Telecasting, Inc., supra; Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

7. Finally, we conclude that Seniors should be assessed a slight-to-moderate diversification "demerit" for its attributable 33.8% ownership interest (50.5% times the Cowans' combined 67% interest) in, and Kenneth Cowan's general managership of, another regional FM station, KZTR(FM). We confirm Seniors' concession at oral argument (Tr. 145) that Charles Cowan's ownership interest can properly be attributed to his brother in view of the evident common ownership and control of KZTR(FM). *Cf. Alan K. Levin* (Hearing Designation Order), FCC 80-657, 45 Fed. Reg. 85512, published December 29, 1980, at para. 9 ("a family relationship combined with other indicia of control may result in a finding of de facto common control"). The magnitude of the attributable ownership interest, the additional attributable significant managerial position (which, as with Daniel Forrestall, must be considered despite Kenneth Cowan's post-cutoff date decision to resign as KZTR(FM)'s general manager), the relative proximity of KZTR(FM) to San Diego, and the fact that it is in the same service as KIFM(FM), taken together, give Seniors the most substantial attributable media interests in this proceeding. But, when measured against other diversification cases, the approximate level of "demerit" remains in the slight-to-moderate range. *Cf. Phoenix Media Corp., supra* (moderate demerit for controlling interests in four in-state broadcast stations). In sum, Partners and Pan-American, the only

applicants with no cognizable media interests, are entitled to a slight-to-moderate diversification preference over Seniors and a very slight preference over Fessenden and Jubilee.

8. *Integration of Ownership and Management.* All of the applicants except Fessenden propose 100% full-time integration of their principals. Partners' principals Ethel Mike, Rosalee Sell, and Mary Sorrentino will serve as general manager, station manager, and program director, respectively. Merger Agreement, p. 2. Pan-American voting directors Margarita Alvarez and David Lizarraga will share the title of associate director of community affairs and community related programming, while Gloria Valencia proposes to work as general manager, David Robles as sales manager, and Roberto Izabal as chief financial officer. Pan-American Exhs. 2-6.[5] Seniors' voting members Kenneth Cowan, Margaret Helton, Avis Johnson, and Anne Fabrick will be general manager, assistant general manager, director of public affairs and business manager, respectively. Seniors Exhs. 3-6. And Jubilee's general partner Elaine Ford intends to serve in a managerial role. Jubilee Exh. 2. With respect to Fessenden's eleven voting directors (each representing approximately 9% voting power), eight propose initially to work at the station on a full-time basis, and three on a part-time basis, *i. e.*, during vacations from present employment or on weekends. Fessenden Br. at 7-8. All of the quantitative proposals have been challenged by the competing applicants.

9. *Challenges to Quantitative Integration Credit.* Partners' commitment of 100% quantitative integration is assailed by Pan-American on the ground that its merger agreement is too indefinite to support any award of integration credit because, on the one hand, it states (merger agreement, para. 2) that the equity interest in the broadcast entity will be allocated 50% for Ms. Mike and 25% each for Ms. Sells and Ms. Sorrentino, while on the other hand, it indicates (agreement, paras. 4-6) that the voting power over the proposed station's day-to-day operations will be shared equally by each of the three partners through a management committee. Pan-American Reply Br. at 6-7.[6] Fessenden joins the attack on Partners, asserting that the proposed management by committee is unworkable and will result in a stalemate whenever disagreements arise over policy decisions. Fessenden Reply Br. at 15.

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[5] Directorship positions in non-stock broadcast entities are equated by the Commission with ownership interests for purposes of determining integration percentages. *See Roanoke Christian Broadcasting, Inc.*, 92 FCC 2d 1477, 1478, 52 RR 2d 1725, 1727 (Rev. Bd. 1983).

[6] In its brief (at 11), Pan-American initially took issue with Partners' right to comparative consideration on the ground that its merger proposal failed to meet the merger filing deadline. Pan-American apparently dropped this objection in its reply brief (at 6). It is clear that the merger proposal was timely filed, and we are persuaded that it was sufficiently complete on December 6 to justify comparative consideration.

10. We will credit Partners with 100% quantitative integration credit. The Review Board has previously held that an applicant "is entitled to the percentage of quantitative integration credit that accurately reflects the extent of legal authority and voting power the integrated owners possess to implement station policy decisions." *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 427, 55 RR 2d 627, 632 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 510, 52 RR 1210, 1213 (Rev. Bd. 1982). Here, with respect to the applicant's proposal, it is not significant whether Ms. Mike's voting power is 50% or 33-1/3% (1/3 of the partnership) because in either event, 100% of the principals (all three principals) are firmly committed to participating on a full-time basis (no less than 40 hours weekly) in the day-to-day management of the station. Pan-American has not cited any case where an applicant's integration proposal was rejected as imprecise merely because a principal's equity interest and voting power were unlike. Generally, when presented with such proposals, the Board has awarded each principal integration credit commensurate with his or her voting power. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 816-817, 51 RR 2d 409, 420-421 (Rev. Bd. 1982) (80% equity owner's integration commitment diminished to 33-1/3% voting credit). Moreover, we have previously rejected the contention now raised by Fessenden that management committees are inherently unworkable and entitled to no integration credit. *See Waters Broadcasting Corp.*, 88 FCC 2d 1204, 1207-1208, 50 RR 2d 1110, 1113-1114 (Rev. Bd. 1981), *reversed on other grounds*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982); *cf. Merrimack Valley Broadcasting, Inc., supra*, 92 FCC 2d at 509-510, 52 RR 2d at 1213-1214 ("in the absence of persuasive evidence to demonstrate that such disagreements will paralyze the management functions of the partnership, full quantitative integration credit will be awarded"). Thus, although Partners is fully entitled to 100% quantitative integration credit, we will revise the quantitative credit attributable to each principal to 33-1/3% to reflect the apparent voting power held by each partner in the management committee.[7] *WHW Enterprises, Inc., supra.*

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[7] Similarly, we do not find legally unsettling language from the merger agreement cited by Pan-American that the "General Partners . . . shall develop a Management Plan . . ." prior to the commencement of operation of the station outlining" . . . the functional structure and proposed organizational structure of the [applicant]." It is clear from para. 8 of the agreement that additional legal documents (including the new partnership agreement) remain to be executed, incorporating in form and substance the provisions of the merger agreement. Suffice it to say here that as in *Joseph Bahr, supra*, and *Phoenix Media Corp., supra*, other proceedings involving applicants for interim operations where no evidentiary hearing was compiled before an ALJ, we have based our findings of fact upon uncontroverted statements set forth in written pleadings and at oral argument. Here, Partners' merger agreement clearly sets forth its integration proposal.

11. Partners and Fessenden challenge Pan-American's claim of 100% quantitative integration credit, arguing that neither Ms. Alvarez nor Mr. Lizarraga can be credited for integration purposes because they both propose to hold the position of associate director of community affairs and community related programming. Mike Proposed Findings at 32; Fessenden Reply Br. at 13. Additionally, Partners questions the integration undertakings of Mr. Izabal and three others (presumably David Robles, Margarita Alvarez, and David Lizarraga) on the ground they have not shown the same willingness and ability to commit their time as have Partners' principals. The Board has previously held that shared managerial titles or overlapping roles do not provide an adequate basis for reducing or rejecting integration credit as long as the principals have managerial functions in areas of responsibility that are sufficiently distinct. *See MTF Enterprises,* FCC 84R-69, released October 5, 1984 (Rev. Bd.); *Minority Broadcasters of East St. Louis, Inc.,* 56 RR 2d 275 (Rev. Bd. 1984). Here, Ms. Alvarez will be responsible for supervising the broadcast of community affairs and related non-entertainment programming. Pan-American Exh. 3, p. 2. Mr. Lizarraga, who will coordinate his activities with Ms. Alvarez, believes that his extensive background in community-based organizations will help him involve San Diego's groups in the station's non-entertainment programming. Pan-American Exh. 4, p. 3. Additionally, he will work with the other directors on all aspects of the station's programming and operations. *Id.,* pp. 3-4. In light of this record, we conclude that Alvarez and Lizarraga will have sufficiently distinct areas of managerial responsibility to justify full integration credit. *Cf. Merrimack Valley Broadcasting, Inc., supra,* 92 FCC 2d at 511, 52 RR 2d at 1214, where the Board approved proposals that divided public affairs programming into three positions — minority affairs director, women's affairs director, and community affairs director. Finally, there is no record support for the speculative contention that four of the Pan-American principals will not be able to effectuate their commitments because of their current employment. All four have testified without contradiction that they would curtail their present activities to accommodate fully their integration commitments. That is all that is required. *See White Mountain FM, Inc.,* 54 RR 2d 1465 (Rev. Bd. 1983). And since the principals of both Pan-American and Partners propose to work full time at the station, *i. e.,* no less than 40 hours per week, there is no basis for awarding one applicant a preference over the other for the amount of time each will devote to the station. Pan-American is entitled to 100% quantitative integration credit.

12. Seniors' proposal of 100% quantitative integration is contested by both Pan-American and Partners. Initially, Pan-American notes that Seniors has not identified its non-voting members and their proposed roles

in the station. Pan-American argues that the mere act of characterizing such members as "non-voting" is insufficient to exclude them from our integration analysis. Pan-American Br. at 13. Moreover, Pan-American would deny integration credit to Anne Fabrick and Margaret Helton (both 16.5% voting members) on the ground that their proposed duties are non-managerial. *Id.* at 14. Partners attacks the commitments of Helton and Avis Johnson (a 16.5% voting member) on similar grounds. Mike Proposed Findings at 34. Finally, Partners contends that the commitment of Kenneth Cowan should not be accepted because Mr. Cowan did not propose to resign from his current position as general manager at Station KZTR(FM) before the "B" cutoff date. *Id.* at 33-34.

13. The contentions of Pan-American and Partners are without merit. Seniors states in its reply brief (at 2) that it has no non-voting members at present or any future plans for such members. In any event, no comparative consideration would be given such members in the absence of any authority to control the station. *Cf. Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488, 49 RR 2d 1589, 1594 (1981). Furthermore, the attacks on the proposals of Fabrick, Helton, Johnson, and Cowan are groundless. Ms. Fabrick proposes to work full time as the station's business manager, a position explicitly recognized as managerial by the Commission's *Policy Statement, supra,* 1 FCC 2d at 395, 5 RR 2d at 1910. Similarly, Ms. Johnson will serve as public affairs director and be in charge of all community programming, an area of management responsibility. *See Merrimack Valley Broadcasting, Inc., supra,* 92 FCC 2d at 511, 52 RR 2d at 1214. Turning to Ms. Helton, her position is akin to Pan-American's Mr. Lizarraga since she is responsible for involving senior citizens organizations in the station's public affairs programming on the elderly, based primarily on her extensive background with senior citizens organizations. For the reasons discussed in paragraph 11, *supra,* respecting Mr. Lizarraga, we will likewise credit Ms. Helton's commitment. Finally, we will fully credit Seniors for Mr. Cowan's proposed integration. Seniors Exh. 3. Seniors' reply brief (at 2-3) further represents that Mr. Cowan will cease all involvement with KZTR(FM) if Seniors' application is granted and that this cessation was implicit in his previous testimony that he would work full time at KIFM(FM) and would move to the San Diego area. We have already held that Mr. Cowan's other media ownership and management positions after the "B" cutoff date will be attributed to Seniors for diversification purposes (see paragraph 7, *supra*), but Mr. Cowan's basic integration proposal in Seniors Exh. 3 was timely filed *for integration evaluation purposes* after the "B" cutoff date, pursuant to *HDO,* para. 5, *see Metro Broadcasting, Inc.*, 57 RR 2d 440, 450-51 nn. 8 & 9 (Rev. Bd. 1984), and we may properly take account of his uncontroverted undertaking to resign from KZTR(FM) either as implicit in Seniors Exh. 3,

see Rahu Broadcasting, Inc., 56 RR 2d 285, 286 & n. 2 (Rev. Bd. 1984), or because of Seniors' reply brief clarification. See note 7, *supra.* Seniors will be awarded 100% quantitative integration.

14. Fessenden's quantitative integration proposal, which seeks full-time credit for eight of the applicant's directors (or approximately 72%) and part-time credit for the remaining three (27%), is also challenged by Pan-American and Partners. They contend that Cese McGowan (9%) is not entitled to any credit since she will remain at her position for only one or two months, after which she will serve as a consultant to the station. Pan-American Br. at 2; Mike Proposed Findings at 31. The proposals of Donald Campau (part-time, 9%), Kevin Milam (part-time, 9%) and Judith Williams (part-time, 9%) are similarly assailed since all three principals plan to meet their commitments during vacations or on weekends. Finally, Pan-American asserts that Joseph Griffin is not entitled to credit since he will participate only during the initial start-up phase of the station. Pan-American Br. at 2.

15. We will reduce Fessenden's quantitative integration credit as suggested by Pan-American and Partners. It has long been settled that an integration commitment is entitled to credit only if adhered to on a permanent basis. *See Policy Statement, supra,* 1 FCC 2d at 395 n. 6, 5 RR 2d at 1909 n. 6.; *Gainesville Media, Inc.*, 72 FCC 2d 807, 814, 42 RR 2d 489, 499 (Rev. Bd. 1978). Additionally, "consultative positions [are] given no weight." *Policy Statement, supra,* 1 FCC 2d at 395, 5 RR 2d at 1909. Fessenden, therefore, is not entitled to any credit for Ms. McGowan or Mr. Griffin. Nor is Fessenden entitled to credit for the commitments of Mr. Campau, Kevin Milam, or Ms. Williams, since part-time participation must at least be on a weekly basis to receive credit, *see High Sierra Broadcasting, Inc., supra,* 96 FCC 2d at 429, 55 RR 2d at 633; *cf. Greater Wichita Telecasting, Inc., supra,* and the hours of committed time must be explicitly specified. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 55 RR 2d 1299 (Rev. Bd. 1984). Pan-American, in passing, also questions whether credit should be given for principal Pat Sheehan's position as "Program Guide and Volunteers." While we note that the role appears non-managerial, we need not reach that question here since in any event Fessenden is entitled, at most, to only 54% full-time integration credit compared to the 100% credit accorded the applicants above, and qualitative enhancement attributes may not overcome such a clear quantitative difference. *See Van Buren Community Service,* 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981) (12.5% quantitative difference held to be "clear"). Thus, there is no need to consider Fessenden's proposed enhancements in paragraphs 17-19, *infra,* and we conclude that Fessenden finishes last in the integration analysis.

16. Finally, Pan-American, Fessenden, and Partners essentially urge us to set aside for purposes of the integration analysis the limited partnership structure proposed by Jubilee and accord that applicant only 20% integration credit, *i.e.*, the amount of corporate stock owned by Ms. Ford prior to the reconstituting of the applicant entity, rather than the 100% sought on the basis of her general partnership interest. We need not reach this question, either, because as we will explain below, even if Jubilee were to receive 100% quantitative integration credit (which we will assume arguendo), it would still finish behind Partners in the integration analysis.

17. *Qualitative Factors.* Since Partners, Pan-American, Seniors, and Jubilee (for purposes of argument) are all entitled to 100% quantitative integration credit, in order to determine the prevailing applicant under the integration criterion (*sans* Fessenden — see paragraph 15, *supra*), we must now focus on the qualitative attributes of the participating owners. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 55 RR 2d 991 (Rev. Bd. 1984). Turning to the respective applicants, their qualitative enhancement attributes are as follows:

Partners.

(a) local residence — 66⅔%, for Ms. Sell (resident since 1971 except for two years) and Ms. Sorrentino (resident since 1974); (b) civic affairs — 66-2/3%, for Ms. Sell (very extensive) and Ms. Sorrentino (extensive); (c) minority — 33⅓%, for Ms. Mike, a Black woman and proposed general manager; (d) female — 100%; and (e) broadcast experience — 100%, for Ms. Mike (program director and assistant general manager of large public radio station from 1979-1983), Ms. Sell (public affairs director and public service director, news anchor, field reporter, and production, copy writing, programming, and traffic work since 1965), and Ms. Sorrentino (operations director of San Diego educational FM station, announcer, news writer, reporter, and assistant general manager[8] since 1975).

Pan-American.

(a) local residence — 40%, for Ms. Alvarez (since 1963) and Ms. Valencia (entire life); (b) civic affairs — 40% for Ms. Alvarez (extensive) and Ms. Valencia; (c) minority — 100%, all five are Hispanics; (d) female — 40%; and (e) broadcast experience — 0%.

Seniors.

(a) local residence — 100%, for Mr. Cowan (previous resident 1976-1980), Ms. Johnson (5 years), Ms. Fabrick (17 years), and Ms. Helton (44 years); (b) civic affairs — 100%, for Mr. Cowan, Ms. Johnson (extensive), Ms. Fabrick (extensive), and Ms. Helton (extensive); (c) minority — 16.5%, for Ms. Johnson, a Black woman; (d) female —

[8] Seniors challenges Ms. Sorrentino's claim to have served as assistant to the general manager at Station KXXY-FM, San Diego. There is evidence, however, that part of her tenure at KXXY included either the duties or title of that position. In any event, her time spent at that station was short and is only a minor component in her total broadcast experience.

49.5%; and (e) broadcast experience — 50.5% for Mr. Cowan (general manager of two stations since 1976, broadcast experience since 1962).

Jubilee.

(a) local residence — 100%, since January 1984; (b) civic affairs — 100%, since January 1984; (c) minority — 100%, for Ms. Ford, who is a Pacific Islander and Hispanic woman; (d) female — 100%; and (e) broadcast experience — 0%.

18. A perfunctory examination of the above qualitative enhancement credits accruing to each applicant would appear to favor Jubilee since (for purposes of argument, see paragraph 16, *supra*) it possesses 100% credit on four of the five separate factors discussed, falling behind only in broadcast experience. Such an analysis would be illusory, however, since Ms. Ford, the sole general partner of Jubilee, has only recently acquired her local residence status, *i. e.*, since January 1984. The Commission attaches little weight to residence which is not of several years' duration. *See Global Broadcasting Group, Inc., supra,* 94 FCC 2d at 812 n. 19, 54 RR 2d at 407 n. 19. Thus, Jubilee is entitled to little more than nominal enhancement credit for the local residence of Ms. Ford or her civic activities in San Diego. In contrast, Seniors, Partners, and Pan-American with 100%, 66-2/3%, and 40%, respectively, are entitled to greater credit for both local residence and civic affairs, since the periods involved are of much greater duration. The comparison is a virtual toss-up, however, between Seniors and Partners, with Pan-American close behind; *i. e.*, Mr. Cowan, a 50.5% principal of Seniors, is entitled to local residence and minor civic affairs enhancement credit only because of his previous residence, *see Phoenix Media Corp., supra* (previous residence counted because of its recency), and Partners' current residence (66-2/3%) and extensive civic activities moderately outweigh Seniors' current residence (49.5%) and extensive civic activities. Neither Partners nor Seniors is entitled to local residence or civic affairs preferences over the other, and both deserve slight-to-moderate preferences over Pan-American on both factors and substantial preferences over Jubilee. With respect to minority enhancement, Jubilee and Pan-American (both 100%) are entitled to substantial preferences over Partners (33-1/3%) and Seniors (16.5%), and Partners is entitled to a slight preference over Seniors. *See Waters Broadcasting Corp., supra,* 91 FCC 2d 1260, 52 RR 2d 1063. Partners and Jubilee are equal respecting female enhancement (each 100%) and are entitled to substantial preferences over Seniors and Pan-American.

19. Finally, with regard to broadcast experience, an area of special importance in interim operations "because it is difficult for interim operators to attract experienced competent staff to run the station," *see Global Broadcasting Group, supra,* 94 FCC 2d at 813, 54 RR 2d at 408; *cf. Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 653, 53 RR 2d 953, 961 (Rev. Bd. 1983) (broadcast experience is of "minor significance" in

comparing applicants for permanent broadcast authorizations since it generally confers only an initial advantage and so as not to discourage inexperienced newcomers), Partners narrowly prevails over Seniors (despite a decidedly superior percentage advantage of 100% vs. 50.5%), and both are entitled to a substantial preference over Jubilee and Pan-American (each 0%).[9] The margin of superiority over Seniors is not as great as the numerical difference because the broadcast experience of Seniors principal Mr. Cowan has been of greater importance, including general manager experience over ten years. *See Radio Jonesboro, Inc., supra.* On the other hand, the broadcast experience of the three Partners principals has been in a greater variety of broadcast roles and to that extent partially offsets the more significant managerial role held by Mr. Cowan. *See Minority Broadcasters of East St. Louis, Inc., supra.* Because of the larger quantitative integration share held by Partners, however, Partners will be accorded a slight-to-moderate preference over Seniors on this factor. *See New Continental Broadcasting Co.,* 96 FCC 2d 544, 546, 55 RR 2d 413, 415 (Rev. Bd. 1983) (qualitative credit is proportionate to quantitative ownership).[10]

20. Summing up the relative qualitative enhancement advantages enjoyed by Partners versus the other applicants, Partners is entitled to three substantial qualitative preferences over Jubilee, *i.e.* on local residence, civic affairs, and broadcast experience. In contrast, Jubilee is entitled to only a minority preference over Partners. On one element of comparison, female participation, they are even. On balance, Partners enjoys an overall qualitative enhancement preference over Jubilee. Partners is superior to Pan-American on even more qualitative factors, receiving substantial preferences for female participation and broadcast experience, and slight-to-moderate preferences for superior local residence and civic affairs. Only on the minority enhancement factor does Partners fall short. Nevertheless, Partners' integration proposal is qualitatively superior overall, compared to Pan-American. Finally, with

[9] We are not persuaded by Pan-American's contention at oral argument that applicants possessing broadcast experience are not at a decided advantage over those, such as Pan-American, who lack it. Pan American argues that there is no evidence to show that it could not equally attract employees with broadcast experience. Tr. 89. We are of the belief, however, that a station proposing operation for only a short and limited duration would have a more difficult time hiring personnel with qualifications similar to those proposed to be integrated here. In any event, we are obliged by *Global, supra,* to give "added significance" to integrated broadcast experience in interim proceedings.

[10] Seniors argues that an additional factor should be included in our analysis, *i.e.,* the amount of salaries proposed for principals by the respective applicants. We will reject this suggestion. In addition to the absence of any such evidence in the pleadings on this matter (the only salaries discussed are now moot in light of the Partners merger), the setting of salary rates is not an appropriate matter for consideration by the Commission in the absence of flagrant abuse.

respect to Seniors, Partners enjoys enhancement advantages on the minority (33-1/3 vs. 16.5%), female (100% vs. 49.5%), and broadcast experience factors. On the other two areas of comparison they are virtually even. Hence, Partners is also qualitatively superior to Seniors on an overall basis. In sum, we conclude that in terms of an overall quantitative-qualitiative integration preference under the comparative integration criterion, Partners is entitled to slight preferences over Seniors, Pan-American, and Jubilee, *see Radio Jonesboro, Inc., supra,* 96 FCC 2d at 1112 n. 7, 55 RR 2d at 996 n. 7 (superior qualitative applicant entitled to only a slight overall integration preference when quantitative percentages are even), and a moderate-to-substantial integration preference over Fessenden. *See WHW Enterprises, Inc., supra* (moderate preference given for 100% vs. 66-2/3% advantage); *High Sierra Broadcasting, Inc., supra* (substantial preference given for 100% vs. 50% advantage).

21. *Fessenden's Special Requests.* In its November 15, 1984 comparative showing, its brief and reply brief, and a December 5, 1984 motion to enlarge issues, Fessenden makes a special plea that the FM facilities in question ought to be operated, at least on an interim basis, as a "completely non-commercial" station, as it proposes. Fessenden asserts that its programming would address itself to the "pride, culture, joy, and richness in the music and talk" of a large number of ethnic groups, Fessenden Exh. at 8, and would give "voice to the spirit of San Diego's many minority populations, which repossesses the dispossessed with an opportunity to speak as well as listen, and which opens the doors to literally dozens of citizens who wish to volunteer their time and skills to the operation of a public broadcast station." Motion to Enlarge at 3-4. Hence, it requests a specialized or comparative programming issue "in light of the decision already made by the Commission to use the interim operation of these facilities to promote non-commercial purposes in California, the relentlessly commercialized programming to which San Diego has long been subjected, and the dearth of locally-oriented noncommercial programming presently available." *Id.* at 6. Alternatively, Fessenden asks that its application be evaluated under the standard *non-commercial* comparative issues, *see Black Television Workshop of Santa Rosa, Inc.,* FCC 84R-81, released November 15, 1984 (Rev. Bd), instead of under the *Policy Statement, supra,* which governs commercial comparative broadcast hearings. Fessenden Reply Br. at 4-5. Both of Fessenden's requests will be denied.

22. The Board held in *Joseph Bahr, supra,* that it would adhere to the *Policy Statement's* comparative factors in interim authorization proceedings and would not award preferences based on novel considerations. That judgment was affirmed by the Commission, with the minor exception of

giving increased weight to the broadcast experience of integrated principals, in *Global Broadcasting Group, Inc., supra.* Noting that a reserved educational frequency is not at issue in this proceeding and that Fessenden therefore would not be bound to maintain a non-commercial operation, we are not at liberty to disregard guiding Commission precedent by adding non-commercial comparative issues here or judging Fessenden's application under "novel" standards. Neither the *HDO* nor Commission precedent reflects a tilt toward authorizing non-commercial interim operations. *Cf. Pillar of Fire,* FCC 84R-95, released December 21, 1984 (Rev. Bd.), para. 25 (renewal applicant will be neither favored nor disfavored for its voluntary non-commercial policy). As to Fessenden's proposed specialized programming issue, we agree with Jubilee's objection that Fessenden has failed to meet the threshold standards of *George E. Cameron, Jr. Communications,* 71 FCC 2d 461, 45 RR 2d 689 (1979), through showings that it has proposed a specialized format and that this format is not already available in the San Diego market in a substantial amount. Fessenden's programming proposal is very vague, and it has not adequately discussed the non-commercial programming already offered by two San Diego stations which it identifies. Thus, no programming issue will be added. If, as Fessenden intimates, it feels that it has been the victim of a comparative mismatch in this proceeding, the choice was its own. Ninety-day expedited proceedings are not the appropriate forum for novel adventures.

23. *Final Comparative Evaluation.* The *Policy Statement, supra,* has two primary objectives, best practicable service to the public and diversification of control. 1 FCC 2d at 394, 5 RR 2d at 1908. Under best practicable service, we have awarded Partners a slight overall integration preference over Seniors, Pan-American, and Jubilee and a moderate-to-substantial preference over Fessenden. In addition, Partners, Pan-American, and Jubilee are each entitled to a very slight preference for their auxiliary power proposals. *See Addendum to Policy Statement on Comparative Broadcast Hearings,* 2 FCC 2d 667, 6 RR 2d 861 (1966). As to diversification, Partners and Pan-American have been credited with a slight-to-moderate preference over Seniors and a very slight preference over Fessenden and Jubilee. Taken together, Partners' preferences for diversification, integration, and auxiliary power exceed those awarded to its competitors, and we conclude that grant of Partners' application will best serve the public interest, convenience, and necessity.[11]

24. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed by Jubilee Public Broadcasting on December 28, 1984 IS

[11] Under these circumstances, we need not consider further the character questions raised in Mike's November 20, 1984 motion to enlarge issues against Pan-American. See FCC 84R-83, *supra,* at para. 5.

DENIED, and the motion for leave to amend filed by The Reginald A. Fessenden Educational Fund, Inc. on January 8, 1985 IS GRANTED and its amendments ARE ACCEPTED;

25. IT IS FURTHER ORDERED, That Pan-American Broadcasting Corporation's November 19, 1984 deposition notices ARE QUASHED, that the motion to compel answers to interrogatories filed by The Reginald A. Fessenden Educational Fund, Inc. on December 7, 1984 and by Ethel M. Mike on December 11, 1984 ARE DISMISSED and DENIED, respectively, and that Pan-American Broadcasting Corporation's December 12, 1984 motion to strike IS DENIED.

26. IT IS FURTHER ORDERED, That The Reginald A. Fessenden Educational Fund, Inc.'s December 5, 1984 motion to enlarge issues IS DENIED;

27. IT IS FURTHER ORDERED, That the joint request for approval of settlement proposal filed December 6, 1984 and supplemented on January 14, 1985 by Ethel M. Mike, Rosalee Sell and Mary F. Sorrentino, and Ronald Kent Galon IS GRANTED and the merger and settlement agreements ARE APPROVED; and

28. IT IS FURTHER ORDERED, That the application of KIFM Partners (successor to Ethel M. Mike) (File No. BPHI-840727JF) for interim authority to operate the facilities of former Station KIFM(FM), San Diego, California, IS GRANTED; that the applications of Ronald Kent Galon (File No. BPHI-840725IA), San Diego Symphony Association (File No. BPHI-840726IC), Rosalee Sell and Mary F. Sorrentino (File No. BPHI-840727IC), and San Diego University Foundation (File No. BPHI-840727IS) ARE DISMISSED, and that the applications of The Reginald A. Fessenden Educational Fund, Inc. (File No. BPHI-800905AE), Pan-American Broadcasting Corporation (File No. BPHI-840726IA), Jubilee Public Broadcasting (File No. BPHI-840727JE), and San Diego Seniors in Action Network (File No. BPHI-840727JP) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Certification of Questions
Interlocutory Ruling Appeal From
Stay

Review Board certifies question whether Commission has retained exclusive jurisdiction over review functions in thirteen license renewal proceedings currently pending involving RKO General, Inc. It also denies motion for stay of all discovery relating to applicant's financial qualifications and dismisses request for extraordinary relief as an unauthorized appeal from an interlocutory ruling.
—RKO General, Inc. (WRKO)
MM Docket No. 84-1057

FCC 85R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
RKO General, Inc. (WRKO) Boston, Massachusetts	MM Docket No. 84-1057 File No. BR-953
For Renewal of License	
The Commonwealth Broadcast Group Boston, Massachusetts	MM Docket Nos. 84-1058 to 84-1066 and 84-1069
et al.	
For Construction Permit for a New AM Station	
RKO General, Inc. (WROR-FM) Boston, Massachusetts	MM Docket No. 84-1070 File No. BRH-617
For Renewal of License	

The Commonwealth Broadcast Group Boston, Massachusetts *et al.* For Construction Permit for a New FM Station	MM Docket Nos. 84-1071 to 84-1072; 84-1074 to 84-1081; and 84-1083 to 84-1084

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 1985; Released: February 21, 1985

BY THE REVIEW BOARD:

1. The Review Board has under consideration a motion for stay and a request for extraordinary relief simultaneously filed on February 11, 1985, by Nash Communications Corporation (Nash) in the above-styled proceeding. The motion seeks an immediate stay of all discovery in this proceeding to a financial qualifications issue designated by the Commission against Nash[1]; the request for extraordinary relief urges reversal of the *Memorandum Opinion and Order* of the presiding Administrative Law Judge (ALJ) (FCC 85M-417, released January 28, 1985), which denied its petition for leave to amend its application to meet the financial issue by submission of a financial certification.[2] We deny the motion for stay, and we dismiss the request for extraordinary relief for the reasons set forth below,[3] but first turn to the larger question of whether interlocutory appeals, in this and other proceedings where RKO General, Inc.'s applications have been designated for hearing, are properly before us.

2. The preliminary question to be considered by any adjudicative forum is whether it has jurisdiction to entertain the dispute. *See generally, FCC* v. *ITT,* 104 S.Ct. 1936, 1939 (1984). Under Part 0 of the Commission's Rules and Regulations, the Review Board is delegated express authority in all adjudicative cases to act on interlocutory and final appeals from rulings by the ALJs filed pursuant to Sections 1.301 and

[1] *Memorandum Opinion and Order,* Mimeo No. 35045, released December 4, 1984 (Comm'n).

[2] Opposition pleadings were filed to the request for extraordinary relief on February 13 and 14, 1985, by South Jersey Radio, Inc. and RKO General, Inc., respectively, and an opposition was filed to the motion for stay on February 14, 1985 by RKO General.

[3] Because Nash was required to produce its financial documentation on or before February 15, 1985, the parties were notified orally on February 14 that the requested relief would not be granted.

1.302 of the Commission's Rules, 47 CFR §§1.301 and 1.302, and on initial and summary decisions. *See* Section 0.365(b) of the Commission's Rules, 47 CFR §0.365(b). In *RKO General, Inc. (KHJ-TV),* 54 RR 2d 53 (1983), however, which pertains to the renewal application of the above-captioned licensee's commonly-owned station in Los Angeles, and which is inextricably intertwined with the various remaining license renewal applications of RKO General, including this one, the Commission, to save time and to avoid relitigation, designated the *KHJ-TV* proceeding as the lead forum for determining the impact of RKO's disqualification in Boston for Station WNAC-TV on its qualifications to be the licensee of its remaining stations. *See RKO General, Inc. (WHBQ-TV),* FCC 84-535, released November 23, 1984, at n.3 for a more detailed discussion of this matter. In that November order, the Commission declared (at para. 15) that "[a]ny appeal from the Supplemental Initial Decision will be filed with the Commission." 54 RR 2d at 58. Subsequently, when an interlocutory appeal from an ALJ's discovery order in the *KHJ-TV* proceeding was initially directed to the Review Board (but later referred to the Commission), the Commission observed that "the matter was properly referred to the full Commission which has elected to retain exclusive review jurisdiction of this proceeding." *RKO General, Inc. (KHJ-TV),* 97 FCC 2d at 423 n.1 (1984), *citing* 54 RR 2d 53, 58 at para. 15. Except for the *KHJ-TV* proceeding, the designation orders with respect to the remaining RKO General license renewal applications are silent as to the Commission's intent. Because of the foregoing circumstances, it is unclear whether the Commission contemplated excluding review functions in all of the RKO license renewal proceedings from the purview of the Review Board. In light of this uncertainty (coupled with the distinct possibility that similar appeals from interlocutory rulings will subsequently arise in this and other RKO comparative renewal hearings), it is appropriate pursuant to Section 0.363(a) of the Commission's Rules, 47 CFR §0.363(a), to certify the question of jurisdiction to the Commission, and we hereby do so in order to elicit a definitive ruling.

3. For the purposes of the instant appeal, however, which requires immediate attention because of the time factor involved, we will assume that we have authority to rule on the motion for stay and request for expedited relief. On that assumption, we conclude that the request for extraordinary relief is an unauthorized appeal from an interlocutory ruling, *see* 47 CFR §1.301(b), since leave for appeal was disallowed by the presiding officer,[4] and that Nash has not made the requisite showing to justify waiver of the rule. *See Communications Satellite Corp.,* 32 FCC 2d 533, 534 (1971) (appellant must demonstrate "such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and

[4] FCC 85M-603, released February 8, 1985 (ALJ).

a hearing *de novo;* or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected"). As is the case in many comparative proceedings, Nash is merely required to submit additional evidence to meet a basic qualifying issue. Certainly, that alone does not meet the heavy burden for waiver of 47 CFR §1.301. *See Jan Di Broadcasting, Inc.,* 93 FCC 2d 890 (Rev. Bd. 1983). Moreover, Nash does not even attempt to satisfy the requirements for issuance of a stay set forth in *Virginia Petroleum Jobber's Association* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.,* 559 F.2d 841 (D.C. Cir. 1977), *i.e.,* (1) likelihood of prevailing on the merits; (2) irreparable injury; (3) insubstantial harm to other parties; and (4) the public interest. Nash merely asserts that the usual public interest arguments against stays do not apply, because its case will not be decided until RKO's basic qualifications are first determined through resolution of an entirely independent proceeding. Grant of the stay, however, would not be in the interest of the public or the other applicants in Nash's proceeding, since it would disrupt and delay the initial phases of this hearing, which phases have already begun. *See, e.g., High Springs Television, Inc.,* FCC 85R-12, released February 5, 1985 (Rev. Bd.).

4. ACCORDINGLY, IT IS ORDERED, That the question as to whether the Commission has retained exclusive jurisdiction over review functions in the thirteen license renewal proceedings involving RKO General, Inc. IS CERTIFIED to the Commission for its consideration pursuant to Section 0.363(a) of the Rules, 47 CFR §0.363(a); and

5. IT IS FURTHER ORDERED, That the motion for stay, filed February 11, 1985, by Nash Communications Corporation IS DENIED, and that the request for extraordinary relief, filed February 11, 1985, by Nash Communications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Comparative Criteria
Designation Order, Reconsideration of
Grant, Held in Abeyance
Hearing, Expedited
Initial Decision, Partial
Qualifications, Comparative

Commission clarifies designation orders to permit expedited consideration of comparative qualifications of competing applicants. Administrative Law Judges directed to issue partial Initial Decisions, which are to be held in abeyance pending resolution of renewal applicant's overall basic and comparative qualifications.
—RKO General, Inc. (WYFR-FM)
MM Docket No. 84-1085

FCC 85-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of:	
RKO General, Inc. (WYFR-FM) Chicago, Illinois	MM Docket No. 84-1085 File No. BRH-790801A3
and Associated Dockets	MM Docket Nos. 84-1086 through 84-1097
RKO General, Inc. (WHBQ-TV) Memphis, Tennessee	MM Docket No. 84-1212 File No. BRCT-790402LC
and Associated Dockets	MM Docket Nos. 84-1213 through 84-1225
RKO General, Inc. (WGMS) Bethesda, Maryland	MM Docket No. 84-1148 File No. BR-1403

and Associated Dockets	MM Docket Nos. 84-1149 through 84-1183
RKO General, Inc. (WRKO) Boston, Massachusetts	MM Docket No. 1057 File No. BR-953
and Associated Dockets	MM Docket Nos. 84-1058 through 84-1084
RKO General, Inc. (WAXY-FM) Fort Lauderdale, Florida	MM Docket No. 84-1112 File No. BRH-781002WR
and Associated Dockets	MM Docket Nos. 84-1113 through 84-1121
RKO General, Inc. (KHJ) Los Angeles, California	MM Docket No. 84-1184 File No. BR-22
and Associated Dockets	MM Docket Nos. 84-1185 through 84-1211
RKO General, Inc. (WHBQ) Memphis, Tennessee	MM Docket No. 84-1051 File No. BR-790402CZ
and Associated Dockets	MM Docket No. 84-1052 through 84-1056
RKO General, Inc. (WOR) New York, New York	MM Docket Nos. 84-1122 File No. BR-177
and Associated Dockets	MM Docket Nos. 84-1123 through 84-1147

RKO General, Inc. (KFRC) San Francisco, California	MM Docket No. 84-1098 File No. BR-43
and Associated Dockets	MM Docket Nos. 84-1099 through 84-1111

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1985; Released: February 25, 1985

BY THE COMMISSION:

1. Now before the Commission are a Petition for Clarification filed December 6, 1984 by East Lake Communications, Inc. (East Lake),[1] a Motion to Strike filed December 17, 1984 by Memphis Television Company (Memphis Television) and a Motion for Stay filed December 28, 1984 by River City Communications Corporation (River City). In addition, motions for leave to file comments, and comments, have been filed by Freedom Broadcasting Corporation (Freedom) and People Broadcasting Corporation (People); by Women Owning Radio, Inc. and Women in Broadcasting Corporation (Women); and by River City. An opposition to East Lake's petition was filed December 17, 1984 by the Mass Media Bureau (Bureau). These pleadings all relate to nine Designation Orders adopted on November 8, 1984[2] setting forth the next steps to be taken in the comparative proceedings involving 13 license renewal applications of

[1] The questions raised by East Lake, an applicant in the WYFR-FM, Chicago, Illinois proceeding, are common to nine proceedings involving RKO renewal applications. Accordingly, we have elected to issue a single order having equal applicability to all such proceedings.

[2] *RKO General, Inc. (WFYR-FM),* Chicago, Illinois, FCC 84-539, released November 29, 1984; *RKO General, Inc. (WGMS and WGMS-FM),* Bethesda, Maryland/Washington, D.C., FCC 84-543, released December 17, 1984; *RKO General, Inc. (WRKO and WROR-FM),* Boston, Massachusetts, FCC 84-538, released December 4, 1984; *RKO General, Inc. (WAXY-FM),* Fort Lauderdale, Florida, FCC 84-541, released December 6, 1984; *RKO General, Inc. (KHJ and KRTH-FM),* Los Angeles, California, FCC 84-544, released December 20, 1984; *RKO General, Inc. (WHBQ-TV),* Memphis, Tennessee, FCC 84-535, released November 23, 1984; *RKO General, Inc. (WHBQ),* Memphis, Tennessee, FCC 84-534, released November 30, 1984; *RKO General, Inc. (WOR and WRKS-FM),* New York, New York, FCC 84-542, released December 11, 1984; and *RKO General, Inc. (KFRC),* San Francisco, California, FCC 84-540, released December 11, 1984.

RKO General, Inc. (RKO).[3]

2. In those orders we stated our belief "that it would be premature to commence any consideration of either RKO's qualifications or the comparative elements of the applicants' proposals, pending the outcome of the KHJ-TV case."[4] We were guided by our desire to avoid duplicative adjudication and to obtain the most efficient and effective utilization of Commission resources.

3. In its Petition for Clarification, East Lake, an applicant in the WFYR-FM, Chicago proceeding, contends that restricting the next stage of these proceedings to an ascertainment of the competing applicants' basic qualifications will not appreciably advance the progress of these cases and is therefore inconsistent with the court's mandate in *New South Media Corporation* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982). In *New South* the court directed the Commission to adopt procedures allowing for immediate challenges to RKO's conditionally granted license renewal applications. East Lake requests that the challenging applicants now be permitted to proceed with their comparative cases. East Lake suggests that once the comparative phase of the respective proceedings are completed the presiding Administrative Law Judges (ALJ's) should issue partial Initial Decisions. The filing of appeals and exceptions to these partial Initial Decisions should, however, be deferred pending resolution of RKO's basic and comparative qualifications. Such a determination will necessarily encompass consideration of the findings and conclusions reached in the KHJ-TV proceeding, as well as findings and conclusions peculiar to each of the respective individual proceedings. Since questions of RKO's overall basic and comparative qualifications are already the subject of the ongoing KHJ-TV proceeding, East Lake suggests that the comparative cases be allowed to go forward at this time, without consideration of RKO's qualifications. This approach, East Lake concludes, would allow the competing applicants to proceed against one another while allowing the KHJ-TV proceeding to go forward on a parallel track.

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[3] RKO is the licensee of 12 radio stations and 3 television stations. All of these licenses, other than that of a VHF television station located in Secaucus, New Jersey, are being challenged in comparative renewal proceedings.

[4] The KHJ-TV, Los Angeles, California case refers to the comparative renewal proceeding between RKO and Fidelity Television Corporation. In that proceeding the Commission is examining the impact of RKO's disqualification as the licensee of Station WNAC-TV, Boston, Massachusetts, on its overall basic and comparative qualifications to remain a licensee elsewhere.

4. Pleadings filed by River City and Freedom/People support East Lake's petition.[5] Freedom and People agree that the Commission's procedures are too restrictive and would do little to advance resolution of the comparative proceedings. They too urge the Commission to permit the ALJ's to select comparative winners among the challenging applicants. River City supports East Lake's suggestion that the ALJ's be permitted to initiate discovery procedures and to render partial Initial Decisions on the basic and comparative qualifications of the challenging applicants. River City suggests that this procedure, in the long run, will best facilitate ultimate resolution of the comparative proceedings, once the KHJ-TV proceeding is completed. River City points out that if RKO is found disqualified, a replacement applicant will already be in position. If RKO were to receive a comparative demerit by virtue of the KHJ-TV case, only RKO's basic and comparative qualifications would remain to be assessed against each of the leading applicants selected by virtue of the bifurcated proceedings.

5. Opponents[6] challenge East Lake's petition on the procedural ground that it is an unauthorized petition for reconsideration of the Hearing Designation Orders, contrary to Section 1.106(a)(1) of the Commission's Rules. Substantively, opponents contend that the present procedures provide for the most efficient use of the Commission's resources. They argue that it was reasonable for the Commission to delay extensive adjudication at this time since such "hearings may be profoundly affected, if not completely obviated, by the Commission's resolution of the qualifications issues now pending against RKO. . . ."[7]

6. As a general proposition, the opponents to East Lake's petition for clarification are correct in that East Lake has filed an unauthorized petition for reconsideration of the designation order in violation of Section 1.106(a)(1) of the Commission's Rules. However, such rules can always be waived when the public interest and special circumstances so require. *Alabama Citizens for Responsive Public Television, Inc.*, 69 FCC 2d 1062, 43 RR 2d 999 (1978). Such is the case here. East Lake and its supporters are not attacking the substantive matter of the underlying designation orders but have made salient suggestions designed to serve the public interest by expediting resolution of these comparative cases

[5] River City is a competing applicant in the WHBQ-TV, Memphis, Tennessee proceeding. Freedom has filed an application in the WOR, New York proceeding and People has submitted an application for WRKS-FM, also part of the WOR, New York proceeding.

[6] Memphis Television a competing applicant in the WHBQ-TV, Memphis, Tennessee proceeding; Women Owning Radio, Inc., a competing applicant in the WOR, New York proceeding; Women in Broadcasting Corp., an applicant in the KRTH-FM, Los Angeles proceeding, and the KFRC, San Francisco proceeding; and the Mass Media Bureau. Women Owning Radio and Women in Broadcasting filed joint comments.

[7] Motion to Strike filed December 17, 1984 by Memphis Television, at para. 4.

without impinging on the progress of the KHJ-TV proceeding and to implement the court's mandate under *New South.* Accordingly, we will waive Section 1.106(a)(1) and will consider East Lake's petition on its merits. For the same reasons, we will deny Memphis Television's Motion to Strike East Lake's petition, but will grant the Motions for Leave to file comments and accept the comments of Freedom/People, Women Owning Radio/Women in Broadcasting, and River City. This will enable us to consider the views of all interested parties in the resolution of the questions at hand.

7. On analysis, we believe that the language of our previous orders warrants modification. Without reaching the question of whether East Lake's approach is mandated by the court's ruling in *New South,* we are now persuaded that the procedures suggested by that party will enable us to expand the scope of inquiry in the proceedings now under consideration, while at the same time satisfying our primary objective of bringing the KHJ-TV, Los Angeles proceeding to a comprehensive and speedy conclusion. East Lake's approach will allow competitors in a "not unduly delayed" manner, the "opportunity to prove, in a comparative contest, that they are best qualified to serve the public interest."[8] In *New South* the court was already concerned with the lengthy delays challengers to RKO's licenses were experiencing and the reality that competitive challenges to RKO's licenses were no closer to resolution than they had been two years earlier when the Commission had designated RKO's renewal applications for non-comparative evidentiary hearings (*RKO General, Inc.,* 82 FCC 2d 291, released November 26, 1980). Since that time more than two additional years have passed. While some progress has been made, it now appears that East Lake's approach could substantially expedite the ultimate selection of the best qualified applicant in each of the proceedings other than KHJ-TV.

8. Accordingly, we are hereby modifying the restrictions imposed in our Designation Orders adopted November 8, 1984 to the extent necessary to enable challenging applicants to proceed at this time with all aspects of their comparative cases as among the competing applicants (but not with respect to RKO). As to these applicants this includes the initiation of discovery and resolution of all basic and comparative issues already designated, as well as such issues as may be subsequently added. Necessary hearings should be conducted and proposed findings of fact and conclusions of law filed, pursuant to the ALJ's directives in their respective cases. The presiding Judges are then to prepare partial Initial Decisions resolving the standard comparative issue as among the challenging applicants and ruling on their basic qualifications. Appeals from these partial decisions will be deferred until the KHJ-TV case is resolved

[8] *New South,* 685 F. 2d at 717.

and until RKO's basic and comparative qualifications are considered, insofar as they specifically pertain to each of its 13 stations other than KHJ-TV. Appropriate new deadlines for filing motions to enlarge issues will run from the release date of this ruling in order to permit the parties to take advantage of our modified procedures.[9] Finally, we believe that it is appropriate under the circumstances of these proceedings, to direct the presiding Judges to proceed expeditiously with their consideration of these matters.

9. ACCORDINGLY, IT IS HEREBY ORDERED, That the Motion for Leave to File Comments in Support of Petition for Clarification filed December 18, 1984 by Freedom Broadcasting Corporation and People Broadcasting Corporation IS GRANTED and their Comments ARE ACCEPTED.

10. IT IS FURTHER ORDERED, That the Request for Leave to File Comments filed December 18, 1984 by River City Communications Corporation IS GRANTED and its Comments ARE ACCEPTED.

11. IT IS FURTHER ORDERED, That the Motion for Leave to File Comments Re Motion to Strike filed December 27, 1984 by Women Owning Radio, Inc. and Women in Broadcasting Corporation IS GRANTED and their Comments ARE ACCEPTED.

12. IT IS FURTHER ORDERED, That the Motion to Strike filed December 17, 1984 by Memphis Television Company, Limited Partnership, IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Clarification filed December 6, 1984 by East Lake Communications, Inc. IS GRANTED to the extent herein indicated.

14. IT IS FURTHER ORDERED, That the Motion for Stay filed December 28, 1984 by River City Communications Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[9] Our action today effectively moots the River City Motion for Stay of the date for filing petitions to enlarge with respect to comparative issues. That Motion will accordingly be dismissed.

Reconsideration, Petition for, Denial of

Review Board denies reconsideration of its *Decision,* FCC 84R-87, released December 7, 1984. Crediting of applicant's upgraded comparative signal coverage from new transmitter site is controlled by *California Broadcasting Corp.,* 90 FCC 2d 800 (1982). One hundred percent minority enhancement credit outweighted 100% female enhancement credit plus "slight" comparative coverage preference. —*Santee Cooper B/cing Co.*
MM Docket No. 83-158

FCC 85R-4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Santee Cooper Broadcasting Company of Hilton Head, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-158 File No. BPH-810722AA
Women's Broadcasting Coalition, Inc. Hilton Head Island, South Carolina	MM Docket No. 83-161 File No. BPH-820128AT
Heritage Broadcasting Corporation Hilton Head Island, South Carolina	MM Docket No. 83-162 File No. BPH-820129AJ
Jesse N. Williams, Jr. Hilton Head Island, South Carolina	MM Docket No. 83-164 File No. BPH-820129AR
Plantation Broadcasting Corporation Bluffton, South Carolina	MM Docket No. 83-167 File No. BPH-820129AW

Reginald Taylor and G. Troy Mattox d/b/a Calibogue Sound Hilton Head Island, South Carolina For Construction Permit for a New FM Station	MM Docket No. 83-173 File No. BPH-820129BT

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1985; Released: January 16, 1985.

BY THE REVIEW BOARD:

1. The Review Board has under consideration petitions for reconsideration filed January 7, 1985 by the Chief, Mass Media Bureau, Federal Communications Commission (hereinafter "Media Bureau") and Women's Broadcasting Coalition, Inc. (hereinafter "WBC").[1] The Media Bureau requests that we reconsider our *Decision,* FCC 84R-87, released December 7, 1984, insofar as we credited WBC with the signal coverage factor it will actually present from its new site. *See Decision* at paras. 23-27. WBC, for the reasons discussed below, argues that it, not Williams, should be the comparative winner. We deny both petitions for reconsideration.

2. In its petition, the Media Bureau seeks to limit the precedent of *California Broadcasting Corp.,* 90 FCC 2d 800 (1982), wherein — after finding that an applicant had met the very strict "good cause" for engineering amendments[2] — the Commission also permitted the subject applicant the coincidental benefit of its increased signal coverage factor from its new site, despite the fact that the Commission's combined action resulted in an indisputable "upgrading" of that comparative element as against that applicant's opponent. *See* 90 FCC 2d at 811 n. 41. The Bureau contends, in essence, that the Commission sought mightily to make *California Broadcasting* a "purple cow" by its language stating that "under the circumstances of this case, the public interest would be best served by accepting the amendment."[3]

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[1] Because we find that the petitions on their face raise no issue requiring reconsideration, we need not wait for receipt of responsive pleadings.

[2] *See* 47 CFR §73.3522(b) and especially subsection (b)(1).

[3] Med. Bur. Pet. at 5 (*quoting* 90 FCC 2d at 811 n. 41). We note that, while the Bureau now urges strenuously that *California Broadcasting* contained "unique facts," it there opposed the site amendment as not meeting the "good cause" test of §73.3522(b)(1). *See* 90 FCC 2d at 806. Neither there nor in this case do we criticize the Bureau's generally strict approach to engineering amendments; indeed, we share its concerns, *see Decision* at para. 27 (and cases rejecting engineering amendments cited therein).

3. We find three prominent flaws in the Media Bureau's analysis. First, the ALJ used language virtually identical to that quoted in *California Broadcasting* in deciding to accept WBC's engineering amendment; he held: "under the rather unique circumstances presented, WBC has established good cause for acceptance of its amendment."[4] We have again scanned the facts of *California Broadcasting* and find that, if anything, the subject *California Broadcasting* applicant had far greater notice of the potential loss of its site than did WBC in our case.[5] Second, in accepting the *California Broadcasting* amendment and giving the amending applicant the important *comparative* benefit of the *actual* (and improved) signal coverage factor from its new site, 90 FCC 2d at 811 n. 41, the Commission obviously relinquished the alternative remedy of permitting a "good cause" engineering amendment so as not to basically disqualify the subject applicant on the critical site issue, *but* "constructively" holding that applicant to its prior signal coverage factor so as to forefend any relative comparative "upgrading." *See Decision* at n. 96.[6] And, third, the Bureau does not explain why, *even if* WBC is to be accorded only a "fictional" comparative signal coverage factor, that "fictional" factor should here be that of a totally different applicant (Santee Cooper) rather than the signal coverage factor WBC would have had from its *original* site, but for the unanticipated loss of that site.[7]

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[4] *Decision* at para., 24 (*quoting Memorandum Opinion and Order,* FCC 83M-3933, released October 31, 1983, at para. 6 (ALJ)). Even, *arguendo,* were the facts in *California Broadcasting* "more 'unique'," that would be relevant only to the core question of "the acceptance of the amendment" under the "good cause" test, not the separate and subsidiary question of *which* signal coverage factor should be used on a comparative basis — the new, the original, or something else.

[5] In *California Broadcasting,* the subject applicant was on notice that the antenna site specified in its January 30, 1979 application was turned into a National Park by Congressional action of March 5, 1979. 90 FCC 2d at 801. In December 1980, the U.S. Department of Interior informed our ALJ that it, therefore, had serious problems with that applicant's site. *Id.* , at 803. But that applicant did not specify a new site until June 1981. *Id.* In the instant case, and despite FAA conditional approval, the Hilton Head airport unexpectedly advised WBC on September 9, 1983 that its proposal was rejected; WBC proffered a new site on September 20, 1983. Med. Bur. Pet. at 2.

[6] It could be argued that the Commission's action in *California Broadcasting* merely eliminated the amending applicant's clear comparative negative, whereas the result of our decision permitted WBC to reap — affirmatively — the comparative benefit of its new site. However, that argument is, we think, a classic example of what the lawyers call a "distinction without a difference." In both cases, the applicants were credited with their *actual* signal coverage factor from their new sites, despite identical negative comparative impact to the competing applicant(s). Because the operative actions in both cases were the same, *i.e.,* acceptance of a new site for "good cause," the consequences must coincide if we are not to be arbitrary.

[7] It will be recalled here that WBC's original proposal would have "encompassed 358 square miles and 37,067 persons," *Decision* at para. thus entitling it, even then, to the same "slight" overall signal coverage preference over Williams it ultimately received in

Thus, in *California Broadcasting* there was no third applicant (such as Santee Cooper) whose signal coverage factor could have been constructively engrafted, and we presume that the Media Bureau's theory in such cases would dictate that the amending applicant's *original* signal coverage factor be employed, there simply being no other relevent coverage factor to constructively enlist. Although the Commission may wish to rethink its *California Broadcasting* result and apply the Bureau's apparent theory in future cases, application of that theory would not alter the result in this case because of WBC's *original* signal coverage superiority over the ultimate winner (Williams) in this case.

4. WBC's petition points out that the Board erred in finding that none of its principals volunteered to move from Hardeeville, South Carolina to Hilton Head Island. It asserts that one of its three principals (33-1/3% each) so proposes.[8] It also seeks additional credit for an "extra" auxiliary transmitter,[9] and asserts that these distinctions — conjoined with its signal coverage superiority — should be decisive in this close case.[10]

5. Our decision conceded our uncertainty as to the relative comparative standing of the WBC and Williams applicants, and we recognized that WBC's other comparative strengths might overtake the designated winner should the "female v. minority" enhancements be closer in relative weight than we have supposed.[11] However, in *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982),[12] the Commission indicated that "substantial enhancement credit" should attend a 100% minority-integrated applicant, *id.*, at 1264, and it concluded: "Accordingly, minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings." *Id.*, at 1266. In *Waters*, therefore, an FCC-favored minority applicant prevailed over a non-favored competitor whose

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this case. Though "WBC would cover 408 square miles and 41,045 persons" from its presently approved site, *id.*, at n. 90, the ALJ constructively awarded it the wholly "fictional" coverage factor of "186 square miles and 20,231 persons." *Id.*, at para. 25. The Bureau concedes that "the 'fictional' or 'constructive' coverage factor attributed to WBC does not completely comport with reality . . . ." Med. Bur. Pet. at 6. With due respect, the Bureau's sheepish use of the adverb "completely" does not save its argument, nor does it suggest precisely *what* "fictional" coverage factor an applicant might hold to in future cases if its paradigm were applied universally.

[8] *See* WBC Pet. at 3. The Board regrets the error.

[9] *Id.*, at 6. No additional credit is warranted. *See Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 653 (Rev. Bd. 1983), *recon. denied*, 94 FCC 2d 72, *review denied*, FCC 84-161, released April 13, 1984 (Comm'n).

[10] *Id.*, at 5-6.

[11] Decision at para. 30. For the most recent agency discussion on this matter, *see generally* FCC Brief in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir.) at 20-30.

[12] *Aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *petition for en banc rehearing denied* (August 2, 1984), *petition for cert. pending* Case No. 84-700.

comparative credentials were otherwise admittedly superior. 90 FCC 2d at 1266. Unless and until contrary policy guidance is available, we do not find WBC's overall qualities sufficient to warrant dislodging the ALJ's ultimate selectee.

6. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed January 7, 1985 by the Chief, Mass Media Bureau, Federal Communications Commission and by Women's Broadcasting Coalition, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Reconsideration, Petition, for Denial of

Petition for special relief, reconsideration, and clarification of *South Florida Broadcasting Company, Inc.*, FCC 84R-89, released December 12, 1984, denied. Petitioner was directed to Section 1.245 of the Commission's Rules for specific procedures relating to the disqualification of a presiding officer.
—*South Florida B/cing Company, Inc.*
BC Docket No. 82-731

FCC 85R-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
South Florida Broadcasting Company, Inc. North Miami, Florida	BC Docket No. 82-731 File No. BPH-810427AJ
Radiocentro Broadcasting Company Miami, Florida	BC Docket No. 82-733 File No. BPH-810630AJ
First Black Broadcasters of Miami, Inc. Miami, Florida	BC Docket No. 82-734 File No. BPH-810630AK
Constance J. Wodlinger Miramar, Florida	BC Docket No. 82-736 File No. BPH-810630AT
Onyx Broadcasting of Miami, Inc. Miami, Florida	BC Docket No. 82-737 File No. BPH-810701AC

Rana Broadcasting Company, Inc. Liberty City, Florida	BC Docket No. 82-738 File No. BPH-810701AE
Southwest Radio Enterprises, Inc. North Miami Beach, Florida	BC Docket No. 82-742 File No. BPH-810701AN
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1985; Released: January 11, 1985

BY THE REVIEW BOARD:

1. The Board has before it an interlocutory pleading filed on December 20, 1984 by First Black Broadcasters of Miami, Inc. and styled "Petition for Special Relief, Reconsideration, and Clarification." In pertinent part, First Black complains that the Board's remand order in this proceeding[1] was "without mention or resolution of First Black's substantiated complaints that [the ALJ] has been unfair."[2] It further claims "animus and bias" on the part of the ALJ.[3]

2. Attention is directed to Section 1.245 of the Commission's Rules, 47 CFR §1.245, wherein the Commission has provided specific procedures for the disqualification of a presiding officer.[4] While First Black is entitled to appropriate consideration of its serious claim of bias and unfairness, the selfsame spirit of fairness mandates that the Commission judicial officer grievously accused be permitted the opportunity for response provided in §1.245(b)(2). Indeed, the very essence of "fairness" is the precept of reciprocality. First Black must adhere to the proper rules; having not complied, its petition is defective.

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[1] *South Florida Broadcasting Company, Inc.*, FCC 84R-89, released December 12, 1984 (Rev. Bd.).

[2] First Black Petition at 8.

[3] *Id.*, at 9.

[4] Under §1.245(b)(1), First Black may petition the ALJ "not later than 5 days before the commencement of the hearing . . . ." We notice that a prehearing conference on this matter was held on December 21, 1984, the day after First Black's filing of the instant petition, and that a filing and hearing schedule have been set by the ALJ. *South Florida Broadcasting Company, Inc.*, FCC 84M-5339, released December 26, 1984 (ALJ).

3. ACCORDINGLY, IT IS ORDERED, That the petition for special relief, reconsideration, and clarification, filed December 20, 1984, by First Black Broadcasters of Miami, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Depreciation Rates

This Order approves the petition to revise the effective date for Southern New England Telephone Company's recently prescribed depreciation rates.

—*Southern New England Telephone Co.*

CC Docket No. 78-196

FCC 85-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for:

The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Continental Telephone Company of Virginia
General Telephone Company of Florida
General Telephone Company of Indiana
General Telephone Company of Michigan
General Telephone Company of Ohio
Illinois Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
New England Telephone and Telegraph Company
South Central Bell Telephone Company
The Southern New England Telephone Company

ORDER ON RECONSIDERATION

Adopted: January 16, 1985; Released: January 22, 1985

BY THE COMMISSION:

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates for common carriers and to revise these depreciation rates when it deems necessary.

2. In December, 1983, Southern New England Telephone Company (SNET) submitted a proposal to revise its depreciation rates based upon a study of its plant in service as of January 1, 1984. Our staff reviewed SNET's study, prepared preliminary rate proposals, and discussed both sets of rate proposals with representatives of SNET and the Connecticut Department of Public Utility Control (CDPUC) at a conference held in February, 1984. At the conference a consensus was reached as to the life and salvage factors which should be used to determine SNET's depreciation rates. On April 23, 1984, SNET formally filed for the prescription of a revised schedule of rates based upon the life and salvage factors agreed to at the conference. In that filing SNET requested that the rates be approved effective on a date not later than January 1, 1985, dependent on the timing of its request to the CDPUC for matching revenues. At the end of November SNET notified our staff that the CDPUC had not rendered a decision regarding the timing of the matching revenues. SNET then requested that we adopt a January 1, 1985, effective date. On December 10, 1984, we adopted revised rates[1] for SNET with an effective date consistent with its request, i.e., January 1, 1985.

3. In December the CDPUC issued a decision[2] in which it requested a July 1, 1984, effective date for SNET's rates. On December 21, 1984, SNET filed a petition for partial reconsideration of our prescription order, requesting that we allow booking of the prescribed rates effective July 1, 1984, instead of January 1, 1985, consistent with the recent CDPUC order.

4. In recent depreciation prescription orders we have stated that we prefer the effective date to be as close to the study date as possible, but in order to allow the carriers an opportunity to achieve capital recovery, we have allowed effective dates within one year of the study date. Inasmuch as SNET's filing was based upon a January 1, 1984 study of its plant, we would normally allow effective dates from January 1, 1984, to January 1, 1985. As a result, both effective dates requested by SNET (i.e., the January 1, 1985, date requested initially and the July 1, 1984, date requested in its petition for reconsideration) are consistent with our stated policy. Of the two dates, however, we prefer the July 1, 1984, date because

[1] See FCC 84-620, released December 19, 1984.

[2] See CDPUC Decision in Docket No. 84-06-08, dated December 18, 1984.

it is closer to the study date and, thus, we believe it will provide all parties with a more accurate and objective financial picture of SNET's operations.[3]

5. Inasmuch as the petitioner requests an effective date that complies with this Commission's effective date policy and with its Rules and Regulations, and the CDPUC concurs with the effective date so petitioned, we herein adopt the effective date requested by the petitioner.

6. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205 and 220, That the Petition for Partial Reconsideration filed by SNET on December 21, 1984 is approved.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[3] For a more complete discussion of effective dates see *Depreciation Rates*, 88 FCC 2d 1223 (1982) at paragraphs 56-60.

Common Carrier, Accounting System Rules, Amendment of

Further Notice of Proposed Rulemaking adopted regarding amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, to revise the accounting system for telecommunications entities.
—*Uniform System of Accounts*
CC Docket No. 78-196

FCC 84-634

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules)	CC Docket No. 78-196

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 19, 1984; Released: January 3, 1985

BY THE COMMISSION:

I. Introduction

1. In this *Further Notice of Proposed Rulemaking (Further Notice),* we are proposing to rescind Part 31 of the Commission's Rules and Regulations (Uniform System of Accounts for Class A and Class B Telephone Companies) and Part 33 of the Commission's Rules and Regulations (Uniform System of Accounts for Class C Telephone Companies). We are proposing further to replace these Parts with a single new Uniform System of Accounts (USOA) for all telephone companies subject to our jurisdiction—Part 32, Uniform System of Accounts for Telephone Companies.

2. The text of the proposed Part 32 (incorporated by reference as Appendix A to this *Notice)* provides for only two classes of carriers: Class A carriers, having annual gross operating revenues of $100 million or more; and Class B carriers, having annual gross operating revenues of less than $100 million. It is our intention to require ultimately a much

smaller level of accounting detail and system compliance from Class B carriers than from Class A carriers, and further discussion in this *Notice* will touch on this concept.

3. Our proposal for a new USOA is based, in large part, on a report prepared by the Telecommunications Industry Advisory Group (TIAG) and transmitted to the Commission on May 31, 1984. The TIAG is a Federal Advisory Committee created by the Commission in the *Second Supplemental Notice of Proposed Rulemaking and Order (Second Notice)* in this proceeding, 88 FCC 2d 83 (1981). The TIAG's report reflects the general guidance discussed in the *Second Notice* and, consequently, has provided precisely the starting point we envisioned for developing Appendix A.

4. The TIAG's report presents a comprehensive financial accounting system premised on generally accepted accounting principles (GAAP)[1] and structured to reflect the functional nature of a telephone company's telecommunications operations. Although the report represents a substantial departure from the form and content of Parts 31 and 33, it is a cohesive and well-thought-out system approach to satisfy our request for a revised USOA recommendation. Nevertheless, the report does recommend a number of changes in areas of Commission policy with which we cannot agree. Thus, we propose to depart in some instances from certain of the concepts or details recommended by the TIAG. (See paragraphs 28, 32, 34, 38, and 46 of this *Further Notice.)* Some modifications we propose embody what we perceive as the proper regulatory philosophy of a new accounting system. Many others are designed to ease much of the potential burden of eventual system implementation which ultimate adoption of our proposal may well generate. Detailed discussions of our proposed Part 32 are contained in Sections III and IV of this *Further Notice.*

II. Background

5. In July 1978 the Commission issued a *Notice of Proposed Rulemaking,* 70 FCC 2d 719 (1978), in the above-captioned proceeding. We stated at that time that we envisioned a revised USOA as a regulatory information system that would meet all the ordinary needs of the Commission for the regulation of telephone common carriers. We recognized the necessity of revising the USOA because the system adopted in

[1] The question of the extent to which the new USOA will embrace the concept of GAAP (as would be practiced in an unregulated environment) is currently at issue in CC Docket No. 84-469. (Reference *Notice of Proposed Rulemaking,* 49 F.R. 21377, May 21, 1984.) The fact that Appendix A reflects GAAP as recommended by the TIAG should in no way be construed as indicative of the decisions we will make in that Docket. GAAP was incorporated in Appendix A only for administrative ease at this juncture. The final Part 32 will be amended accordingly based on our conclusions in CC Docket No. 84-469.

1935 is anachronistic in a massively more complex and competitive, technological and economic environment. To keep pace with these changes, and at the same time to maintain our responsibility to regulate carriers rates in the public interest, it became essential that we develop and implement a revised system of accounts. We envisioned that such a system would constitute a single database which would serve several functions.

6. On August 9, 1979, the Commission released a *First Supplemental Notice of Proposed Rulemaking (Supplemental Notice),* 44 F.R. 47359, August 13, 1979. In that document, the Commission expanded on its concept of a regulatory information system and sought further comment on the single database approach, as well as on several new issues raised by the comments to the original *Notice.*

7. The comments received in response to the *Supplemental Notice* indicated that the proposed system would be too complex to implement and administer, would be cost prohibitive to all parties, and, premised on service offerings, would be unstable. Commenters further claimed that the industry environment had not been sufficiently considered and that the industry itself had not been properly represented in the development of the proposal. In response to the comments, we issued the *Second Notice.* In the *Second Notice* we set aside the single database approach and determined that the revised USOA would be designed to interrelate both with cost allocation procedures and with the jurisdictional separations process. Further, we determined that the revised USOA should not be segregated by service categories. In no sense, however, did we abandon our commitment to cost of service ratemaking, but we decided that the USOA proceeding should interrelate in a coordinated fashion with other proceedings implemented in response to the newly competitive telecommunications environment.

8. In the *Second Notice* we also iterated a new set of objectives responsive to the comments made as well as to the original objectives of keeping pace with changes and maintaining our responsibility to regulate carriers in the public interest. These objectives are:

1. The new USOA must exist in the new competitive environment, balancing our continuing needs for regulatory information against our desire not to impose unreasonable or unnecessary reporting requirements on telephone companies. It should significantly reduce the number and complexity of special studies by providing, on a regular basis, the normal accounting input necessary for the regulatory process.

2. The new USOA should ascertain appropriate accounting categories, recognizing that it is a simpler matter to aggregate smaller categories than to disaggregate larger ones. The desirability of smaller categories should be carefully balanced by the concern not to impose burdens upon carriers out of proportion to the usefulness of the information provided.

3. The revised USOA should not be tied to any particular cost of service methodology, as such methodologies may well change with time, with changing technology, or with relevant economic or legal considerations. A stable base from which to build is necessary to provide the ability to produce consistent and reliable output without the necessity of changing the accounting system each time a costing methodology is revised.

4. The new accounting system should be consistent with the regulatory requirements of the new telecommunications environment. With some companies offering regulated and unregulated services through different corporate entities, and with other companies offering both regulated and unregulated services through the same corporate entity, it is important that an effective accounting system be in place. While structural separation facilitates the identification of revenues and expenditures associated with regulated activities from those associated with unregulated activities, it does not eliminate the need for an accounting system. Where structural separation is not present, precise accounting procedures are even more important.

9. With the preceding providing the context for action, detailed procedures to be employed in the development of the revised USOA were set forth in the *Second Notice.* These procedures were directed to two major areas—the revised system concept and the establishment of a task force to develop the new USOA.

10. It was conceived that the new USOA would be a financial accounting system which would meet the financial and primary fiduciary reporting needs of the telephone industry and would provide the body of financial data to which appropriate methodologies could be applied to develop the requisite information to satisfy both our regulatory needs and the carriers' managerial needs. In this manner efficient regulation would be served by this Commission's relying upon the same database utilized by management, rather than relying upon data generated solely for submission to this agency. This concept, we noted, would require a design to support and fully complement, through separate, parallel subsystems (principally those of separations and costing), the evolving regulatory policies of this Commission and any independently developed internal management systems considered necessary by individual common carriers for corporate decision-making, planning and control. Such a design was expected to satisfy the Commission's regulatory concerns for specific costing and separations data—through the interaction of compatible yet discrete financial and methodological mechanisms—and to satisfy the carriers' concerns for a financially-based accounting system to drive other external and internal reporting and decision-making models. *Second Notice, 16-41.*

11. To ensure that the basic integrity of all recorded data would remain intact and that the system would be auditable and would provide stable, reliable and consistent information, and in keeping with the financial nature of the system, GAAP was identified as a desirable basis.

Exceptions to GAAP would be considered only when the requirements of the regulatory process under the Communications Act, particularly with respect to ratemaking, mandated additional or different accounting. (See Footnote 1 which discusses the phase in this proceeding regarding GAAP issues.)

12. In addition to the flexibility to accommodate diverse uses, the system should readily respond to and accommodate technological and competitive advances in the industry, permitting easy revision of the system to reflect such changes with minimal need to reallocate account balances. Account classifications and groupings should be determined by the concern for this responsiveness to change—limited only to the extent that materiality and relevance become overriding considerations. The classifications and groupings should be characterized by a categorization scheme linked to technological and generic commonalities rather than to service-related or compositely aggregated designations.

13. Recognizing the magnitude of the undertaking and considering the resources required for its completion, and further considering the diversity of uses intended for the system, the *Second Notice* authorized the establishment of the Telecommunications Industry Advisory Group (TIAG) to assist in the design and development of the revised USOA. Furthermore, a Commissioner was appointed as a supervising member to oversee TIAG activities. TIAG was charged with the development, preparation, and submission of a proposal for the basic framework and content of the new system. This charge included developing the necessary accounts with adequate disaggregation to support the anticipated subsystems discussed above, formulating the necessary account definitions and items lists, and drafting the necessary accounting rules to support the revised system. In setting up the TIAG in January 1982 and directing it to develop a revised USOA, the Commission established a joint cooperative effort to assist in expediting the development of the final prescription of the revised USOA. The ultimate responsibility of the revision remains, of course, with the Commission.

14. The general membership of TIAG was eventually comprised of representatives from eleven distinct constituencies including the Federal Communications Commission, American Telephone and Telephone Company, Bell Communications Research (known as "Bellcore"), large independents,[2] United States Telephone Association, American Institute of Certified Public Accountants, other common carriers, National Association of Regulatory Utility Commissioners, consumers, equipment manufacturers, and large users. The general membership has overseen the progress of TIAG, provided the resources to staff and carry out the work

[2] Large independents are comprised of General Telephone and Electronics United Telephone System, and Continental Telephone.

of a steering committee and seven subcommittees to produce the various pieces of the new accounting system, and approved the reports to the Commission comprising the group's recommendations to the Commission for a revised USOA.

15. The TIAG membership has provided the Commission with a wealth of resources and experience which otherwise would not have been tapped by this Commission in following through on the rewrite effort. Through TIAG, the expertise of hundreds of accountants, engineers, attorneys, and other experts was infused into the USOA revision. These experts, many of them dedicated full time to this effort, and their staffs have put tens of thousands of man-hours into this project. The hundreds of hours of subcommittee meetings held over the past three years are documented by 16 cubic feet of records.

16. In the development of the various parts of the revised USOA, each constituency, through its members on the TIAG and/or their alternates working on the various subcommittees, had several opportunities to have its opinions considered. All constituencies were invited to participate at the working subcommittee level by submitting proposed revisions and white papers and by participating in the discussions and votes of the subcommittees. Upon completion of projects at the subcommittee level, each constituency through representation on the steering committee had an opportunity to submit suggestions for revisions and to vote whether or not the proposals should be referred to the general membership for final consideration or back to the subcommittee for further work. In addition, the policy was established that minority reports submitted at the steering committee level were to be sent along with the majority report to the general membership for their consideration. The reports submitted to the Commission included all minority views submitted to the general membership.

17. To date, the TIAG has provided the Commission with seven reports, one being the recommendation upon which the attached proposal for a revised USOA was based. Two other reports have been developed into dockets released for consideration under separate notices. A report on several aspects of depreciation accounting became the basis for a *Notice of Inquiry,* CC Docket 84-468, 49 F.R. 21375, May 21, 1984, and a report on the application of generally accepted accounting principles in a revised USOA was developed into a *Notice of Proposed Rulemaking,* CC Docket 84-469, 49 F.R. 21377, May 21, 1984. The fourth report on issues surrounding the implementation of a revised USOA is discussed in Section V below. The remaining three reports, covering necessary changes to conform the Separations Manual, 47 C.F.R. Part 67, and the access charge rules, 47 C.F.R. Part 69, to the new USOA as well as a recommendation for allocating joint costs to nonregulated activities, are currently under

review by Commission staff. The attached proposed revisions of the USOA accounts, account text and general instructions are to a very great extent taken from the TIAG recommendations; however, the proposal incorporates our changes after consideration of minority reports and identified regulatory needs. These changes are explained in the discussions of the proposal in the sections following.

III. Summary of Proposal

18. Our proposal for a revised USOA is a historical financial accounting system which reports the results of operational and financial events in a manner that enables the independent assessment of those results within a specified accounting period. Within the telecommunications industry certain recurring functions (natural groupings) take place in the course of providing products and services to customers. This proposal reflects, to the extent feasible, those functions.

19. For example, the primary basis of the accounts containing the investment in telecommunications plant are the functions performed by the assets. In addition, because of the anticipated effects of future innovations, the telecommunications plant accounts are intended to reflect technological distinctions. Similarly, the primary basis of the plant operations, customer operations and corporate operations expense accounts are the functions performed by individuals. The revenue accounts, on the other hand, reflect a market perspective of natural groupings based primarily on the products and services purchased by customers. A brief review of the principal chart of accounts (included separately as Appendix B) will help to expand on this foundation.

20. The plant accounts have been disaggregated from the current 20 broad categories to 41 technology-specific accounts grouped among switching, transmission, information origination/termination (e.g., terminal equipment), support (e.g., buildings and vehicles), and other functions, as well as intangibles (such as rights-of-way and patents). As noted above, the expense accounts have been recast and categorized as plant operations, customer operations, or corporate operations, with specific accounts reflecting the activities people perform. The revenue accounts have been expanded from a handful of non-specific service designations to a market-specific array encompassing private network, public network, access, customer premises facilities, and miscellaneous service revenues disaggregated to specific products and services.

21. We have also proposed a two-dimensional matrix concept to classify expenses. Under this concept, every expense, by its nature, has two characteristics, purpose and type. The "purpose" of the expense essentially equates to its functional nature (e.g., plant operations) as identified in paragraph 22 above. The "type", on the other hand, identifies the objective nature of the expense, *i.e.*, wages, salaries, benefits, rents,

and other, as they have been identified in Appendix A. Under the matrix concept, therefore, every expense incurred is classified by both its purpose and its type upon initial recordation within the system.

22. This system, then, is intended to reflect a functional and technological view of the telecommunications industry. In our opinion, this view will provide a stable and consistent foundation for the recording of financial data. Moreover, the financial data contained in the accounts, together with the detailed information contained in the underlying financial and other subsidiary records to be required by this Commission, will, we believe, provide the information necessary to support separations, cost of service, and management reporting requirements. The basic account structure has been designed to remain stable as reporting requirements change.

23. *Account Numbering.* The proposal in Appendix A reflects a different numbering scheme from that provided in the TIAG recommendation (Reference Section 32.01(10)). The numbering system recommended by the TIAG is built upon, and thus follows directly from, the system currently prescribed in Part 31. It appears to us, therefore, that the TIAG recommendation tends to perpetuate to a large extent the archaic logic and inflexibility characteristic of the current USOA. We believe that the four-digit scheme that we proposed instead is simpler and more adaptable to current accounting system theory and practice. In the process of renumbering, we also change the order of accounts to conform with that more generally used for financial reporting. The proposed balance sheet sequence proceeds in the order of liquidity, beginning with working capital items through to the long-term items. Since the numbering scheme and account contents must in any event be revised by carriers to meet the overall objectives of the USOA revision, we see no benefit to retaining a semblance of the old account numbering system. In fact, such a retention may prove detrimental to ultimate accounting uniformity by confusing system users with old, familiar numbers that have new or entirely different meanings.

24. We believe that the new numbering scheme will prove responsive to the widest range of financial statement users. It is logically ordered and is flexible to permit future expansion. Respondents should address explicit problems they might have in implementing this scheme and should offer precise or specific alternatives where such are suggested.

25. *Class B Carriers.* Class B Carriers will not be required to provide the same detail in their account structure as required of Class A Carriers (Reference Section 32.01(01)(c)). Based on the proposed parameters for classification of carriers, about 23 (or 38%) of the 61 carriers currently subject to FCC accounting rules will be classified as Class B. Because their combined revenues, however, represent only 0.6% of 1983 Form M

gross operating revenues ($446 million vs. $75.3 billion), we do not believe that detailed accounting and reporting requirements are needed to provide the Commission with information relative to the regulation of these carriers.

26. We are also quite concerned about the large number of carriers who are not subject to our accounting rules but who may otherwise find it necessary to implement a portion or all of the proposed Part 32. These are carriers who operate in states which require adoption of FCC accounting within their jurisdictions and/or who contract to settle with other carriers on an actual cost (versus average schedule) basis.

27. To recognize our reduced need for regulatory data from smaller carriers, but at the same time to promote continued uniformity and comparability within the industry, we therefore propose that Class B carriers maintain a system of accounts similar in overall concept and structure to that set forth in Appendix A, but only to the level of detail represented in general by the first three (3) digits of the proposed account numbering scheme. A proposed chart of accounts for Class B carriers is presented in Appendix C. The purpose of creating a Class B category is to reduce to the necessary minimum the regulatory burdens and costs on small carriers. While we believe this proposal to be an efficient and useful alternative to full implementation of proposed Part 32 for Class B carriers, we do welcome suggestions for other appropriate levels of detail or additional alternatives which would continue to permit full participation of small carriers in industry activities.

28. *Regulatory Perspective.* Part 31 currently prescribes account 323, "Miscellaneous income charges," which is used to record "below-the-line" costs that are normally disallowed or given special scrutiny in ratemaking proceedings. The account is grouped with other nonoperating accounts to emphasize their special treatment and to provide a more discrete presentation of financial results for the regulated telephone entity.

29. In the report developed by the TIAG, this traditional concept of "below-the-line" accounting has been somewhat abandoned. While the TIAG did provide a series of nonoperating income and expense accounts, the "special charges" account (its counterpart to account 323) was included in an operating expense classification. The general consensus of the TIAG was that the application of the "below-the-line" distinction in this instance did not comport with strict financial accounting concepts. The TIAG recommended that, if specific items are clearly "below the line" transactions, the requirement for their disclosure be satisfied through special subsidiary record identification and reporting procedures. If additional account prescription was deemed necessary, however, the TIAG did recommend that any such account(s) be structured in accor-

dance with the new expense account concepts and not from the perspective of "below the line" accounting prescribed in Part 31.

30. We are not prepared to abandon the accounting distinction for items above and below the line. The USOA is, in the final analysis, a regulatory accounting system and should, at a minimum, provide a ready reference to regulatory authorities on the magnitude and disposition of costs normally disallowed or given special scrutiny in ratemaking proceedings.

31. Thus, to maintain a more precise regulatory perspective in the new system, while maintaining its basic structure and design, we propose to classify "special charges" as a nonoperating income and expense account (Reference Section 32.7370). In our opinion, this approach does little to undermine the basic financial accounting nature of the proposed system while greatly enhancing the system's usefulness as a tool for continued evaluation of this Commission's policies.

32. *Nonregulated Accounts.* The TIAG proposal contains two accounts to record certain transactions occurring when a regulated carrier conducts nonregulated activities without a separate subsidiary for these activities. The two accounts are a balance sheet investment account to record direct plant investment, inventories, and related deferred taxes, and a net income/loss account to record the results of nonregulated operations during the period.

33. In the *Fifth Report and Order,* CC Docket No. 81-893, 49 F.R. 46378, November 26, 1984, however, we have already established the accounting treatment to be afforded nonregulated activities. Consistent with this decision, we are therefore proposing the incorporation in Part 32 of accounting treatment for nonregulated activities which approximates full equity accounting as would be practiced in accounting for the activities of a separate subsidiary. This proposal calls for the investment account to include not only the direct plant and inventory investments, but also all other assets, payables, and undistributed net income, of the nonregulated activity as well, and for the transactions of the nonreglated activities to be recorded in a separate set of books. As this proposal reflects our policy already established in the Docket 81-893, we do not seek additional comment on it.

34. *Clearing Accounts.* TIAG decided that the system of accounts as they developed it would not require the prescription of clearing accounts.[3] Carriers would, under this scheme, be permitted to use clearing accounts where needed, upon notification to the Commission. Account numbers could then be assigned that would be compatible with the carriers'

[3] Clearing accounts are accounts established to provide a medium for the distribution of certain items which affect more than one account and which cannot be allocated appropriately as they are incurred.

internal systems. We are of the tentative view, however, that the system recommended by the TIAG will not adequately provide for identification and proper assignment of all costs associated with several expense areas, namely vehicles and other work equipment expenses and provisioning expenses associated with material and supplies and other inventories.

35. The nature of these costs is such that they almost exclusively support either plant construction or the range of functional groupings. Absent defined clearing accounts, there is no mechanism readily available to recognize this association. To accommodate the identification and assignment of these expenditures, it may be necessary to prescribe accounts in these areas. The proposal attached, therefore, provides for vehicle expense (Reference Sections 32.6112, 6113, 6114, and 6116) and provisioning expense (Reference Section 32.6313) clearing accounts to assure that the amounts associated with these areas have an appropriate mechanism for equitable distribution among the various accounts which they affect.

36. *Cost-Type Subaccount Matrix and Subsidiary Record Categories.* The TIAG's report recommends that cost-type subaccounts for salaries and wages, benefits, rents, depreciation and amortization, and other expenses be prescribed for all expense accounts. While we agree with the matrix concept in principle (as discussed in paragraph 21 above), we are not convinced that it is necessary to prescribe actual subaccounts for this level of detail. We believe that the cost elements can be established within the accounts such that these data are readily available for reporting. To facilitate this concept, we have established in proposed Part 32 detailed accounting requirements within the accounts themselves which we have termed "subsidiary record categories."

37. A subsidiary record category is a specific information requirement within an account. Where a subsidiary record category is specified for a given account, the carrier would be required to maintain its accounting system so that the specified information is readily identifiable and available for reporting to the Commission. In our opinion, subsidiary record categories will provide us with relevant, verifiable data without the costly burdens of carrier system design and maintenance, as the carriers would have the freedom and flexibility to identify this information in a manner compatible with their internal system procedures. Thus, we are proposing a cost-type matrix wherein the individual cost elements are subsidiary record categories instead of prescribed subaccounts (Reference Section 32.6).

38. *Depreciation and Amortization.* As mentioned above, "depreciation and amortization" is a prescribed cost-type element within the matrix concept proposed by the TIAG. These expenses, however, represent a substantial portion of carrier operating costs and have been a focus of

Commission attention. We are concerned that the significance of these costs may well become obscured in the context of the matrix. Thus, we prefer to see depreciation and amortization as separate and distinct expense accounts. Moreover, the detail which would have been otherwise gained by leaving depreciation and amortization as cost types in the matrix will not be lost for reporting purposes. As is the case currently, this detail will be readily available from an analysis of the related allowance for depreciation and amortization accounts which will continue to be maintained so that all accounts, adjustments and retirements will be reported to this Commission periodically and which will be specific to each individual plant account. We have, therefore, established in Appendix A proposed primary expense accounts for both depreciation and amortization expenses (Reference Sections 32.6361 through 6365).

39. *Capitalized Leases.* Since it is our objective to conform to GAAP to the extent possible, this system may allow for the capitalization of leases which qualify for such treatment (depending, of course, on the outcome of previously-discussed Docket 84-469). For regulatory purposes, however, the TIAG proposal has not adequately provided for the identification and classification of such leases.

40. Part 32, as proposed by the TIAG, makes no provision for reflecting capitalized leases separately in the prescribed accounts. Rather, capitalized leases would be recorded in the prescribed asset accounts which, under the TIAG's recommendation, do not identify capitalized lease transactions separately.

41. We have proposed, therefore, that capitalized leases be recorded in a separate account (Reference Section 32.2181). Further, details by type of plant would be maintained for reporting purposes. These measures are primarily to facilitate ratemaking treatment by the FCC and the various state commissions and serve further to mitigate NARUC's objection to the TIAG effort in regard to capitalized leases, as mentioned in paragraph 59 below.

42. *Cable and Wire Facilities.* The traditional account structure in Part 31, which included separate accounts for Aerial Cable, Underground Cable, Buried Cable, Submarine Cable, and Aerial Wire, was predicated primarily on the basis of depreciation considerations. It does not appear that these distinctions are relevant any longer. The results of studies underlying the depreciation represcription process progressively demonstrates that the depreciable lives of the items in these different accounts now in Part 31 are no longer significantly different. Further, in the heavily automated accounting environment existing today, the assurances gained by relegating such distinction to separate accounts are no longer necessarily valid. Thus, we propose to maintain these distinctions as

subsidiary record categories (discussed in paragraph 37 above) so that the information will continue to be available for reporting purposes.

43. We believe, however, that a significant distinction will exist between metallic and nonmetallic cable and wire facilities as light technology becomes more feasible. Such a distinction will be significant for depreciation purposes, as life characteristics of the new technology will undoubtedly differ from those of metallic conductors, and is in keeping with the general requirements of the *Second Notice* stipulating that categorization be linked to technology rather than to service-related designations. Consequently, we have modified the TIAG recommendation to provide that this distinction along — except for the added informational requirements noted above — shall be used for classifying cable and wire facilities. We have proposed, therefore, that cable and wire investment shall be maintained in separate accounts based on the metallic/nonmetallic distinction.

44. Additional disaggregation may be possible. The TIAG proposal in fact included such a recommendation for further disaggregation. TIAG's recommendation would require that cable and wire facilities be maintained as Subscriber and Interoffice subaccounts on the premise that this distinction would facilitate costing. However, we do not agree that this distinction is useful because it does not correlate in any way with services provided nor with our costing procedures contained in Part 67. (Moreover, the varying use of "exchange vs. interexchange" or "toll vs. local" was designed and is meant for depreciation purposes only, and was never intended to substitute for service assignment.) Proper costing would still require allocation through separations and costing procedures. Considering this and considering that the classification of wire and cable on the basis of subscriber and interoffice designations is overly complex and would require continued studies based on changing usage patterns, we are of the tentative view that the associated burden of maintaining a plant inventory on this basis is prohibitive and of questionable usefulness. We do, however, invite alternative suggestions for disaggregating the cable and wire facility beyond the level we have proposed.

45. *Circuit Equipment.* The TIAG proposed that three subaccounts be maintained for Circuit Equipment: Pair Gain, Multiplex, and Other Circuit Equipment. This reflects the usage of equipment rather than the technological basis we had anticipated. It appears that the same distinction used for cable and wire facilities—namely, metallic/nonmetallic — is equally applicable to circuit equipment as this type of equipment is closely allied to the transmission medium which it augments. We propose, however, only one account for the investment in the equipment categorized as circuit. While we have not provided separate accounts in this case for the metallic/nonmetallic distinction, we have proposed that these

distinctions be maintained as subsidiary record categories for accounting and reporting purposes. As with the cable and wire facilities above, we invite suggestions for further or alternative disaggregation of circuit equipment investment on a technological basis.

46. *Access Revenues and Expenses.* The TIAG's report contains a series of access revenue accounts, and corresponding expense accounts, which reflects a somewhat different view of the access charge area than the Commission currently holds. In the *Report and Order,* CC Docket No. 83-1347, 49 F.R. 44289, November 6, 1984, we have established accounts for access revenues and expenses. Consistent with that decision, we are, therefore, proposing the incorporation in Part 32 of accounts for access revenues and expenses as follows.

47. We have proposed access revenue accounts for End User Revenues; Carrier's Carrier Facilities Revenues; and Special Access Revenues (Reference Section 32.53(01)). Within the Carrier's Carrier Facilities Revenues account, subsidiary record categories would identify limited pay telephone; carrier common line; line termination; local switching; intercept; information; common transport; and dedicated transport charges. The interstate and intrastate revenue categories currently prescribed for Part 31 would be accommodated by the blanket interstate and intrastate subsidiary record categories for all revenues contained in Appendix A. Further, Appendix A already provides for access-related billing and collection services under a separate and distinct miscellaneous revenue category.

48. For Access Expenses we have developed a single access expense account (Reference Section 32.6335) which utilizes subsidiary record categories to identify the interstate and intrastate elements as well as the billing and collection and carrier's carrier charges as prescribed for Part 31 in the above *Report and Order.* This approach to access accounting mirrors the requirements now prescribed by the Commission but within the system structure developed by TIAG and, thus, should facilitate carrier implementation.

49. *Depreciation Accounting.* The TIAG proposed changes to the current USOA's depreciation accounting procedures for telephone common carriers. Originally, the TIAG recommended that the Commission initiate a separate proceeding to address depreciation issues outside the context of Docket 78-196 so that the issues of accounting system design would not be clouded with issues concerning revenue requirement impacts. The TIAG addressed several issues concerning depreciation and recommended that (1) the current composite depreciation reserve should be split into component pieces for capital recovery and net salvage, (2) both the cost of removal and gross salvage should be treated as current period items if not distortive, (3) the embedded net salvage reserve should

be eliminated by booking the current realized net salvage against the balance until eliminated, and (4) a modified location life accounting procedure, utilizing net book material cost, should be implemented to give recognition to the capital costs that have been consumed at each location and to reduce the level of "reuse salvage."

50. These recommendations were the subject of the aforementioned *Notice of Inquiry* (Docket 84-468) released on May 16, 1984. At that time, we pointed out that insufficient information was available on the impact of these recommendations and solicited further data from the industry as a whole. However, the responses to the *Notice of Inquiry* did not provide sufficient data to assess the impact of the recommended changes, particularly on the issue of treating cost of removal and salvage as current items. Further, the TIAG recommendations were met with strong opposition on the part of the states commenting in response to the *Notice of Inquiry.* Moreover, the National Association of Regulatory Utility Commissioners dissented from several conclusions and recommendations of the TIAG report. Because of this strong regulatory opposition to the TIAG's recommendations on the depreciation accounting issues, and because of the lack of sufficient information to assess the impact of the change, we propose in this *Further Notice* to retain the depreciation accounting as it appears in the existing Part 31 with one exception. This one exception involves the reuse of minor items that are currently salvaged and charged to the Material and Supplies account at current prices new. We are proposing that minor material and supply items which are salvaged be recapitalized at lower of original cost or market value in keeping with GAAP. This proposal will prevent the write-up in value of used items which now occurs because of inflationary pressures on the cost of new items which are unrelated to the economic circumstances of the salvaged items.

51. *Software.* The TIAG proposal does not explicitly address the treatment of software used in carrier operations. Presumably the requirements of GAAP are to be the guidelines in this area. However, because the primary sources of GAAP have not addressed this issue extensively — except for research- and development-related software costs — there seems to be a considerable variation in the manner that software is treated among enterprises. For the sake of uniformity of treatment, therefore, we believe that some specific guidance in this area is required. Though we provide the following proposal, we welcome comments and alternative proposals on the issue before finalization of guidelines.

52. Our proposal is to treat software expenditures, except those which are properly classified as research- and development-related, in the same manner as any other expenditures. The decision whether to capitalize or expense software related costs should "be made in light of all the facts

and circumstances surrounding the particular situation." This in fact is the guidance provided by the Financial Accounting Standards Board (FASB) for deciding whether to inventory or defer certain software production costs determined not to be research and development (FASB Technical Bulletin 79-2, Paragraph 3). In general, then, we propose that the production or acquisition of software for use in operations should be capitalized if the expenditures relate to the attainment of a benefit that extends over one or more accounting periods beyond the current period. If not, the software should be treated as a period cost and expensed accordingly.

53. *Item and Unit Lists.* The format of the current USOA includes item lists as part of the account descriptions, effectively making the lists an integral part of the USOA. These lists have always appeared in the texts of the various accounts and were given for the purpose of clearly indicating the application of the prescribed accounting in specific cases. These lists have been updated and are included in the traditional manner as part of the text of the revised USOA in Appendix A. It has always been recognized, however, that the item lists are merely representative of what is to be recorded in the accounts and that their inclusion with the account texts is for illustrative purposes only — proper entry of items into accounts is always to be determined primarily by the text of accounts. In fact, the usefulness of the lists in the current format is questionable because they tend to become outdated with changes in technology. Since they are currently an integral part of the USOA, maintenance of the lists requires formal procedures for updating. This is impractical and administratively burdensome, and, consequently, the lists have been allowed to become outdated. Further, the tendency for the lists to become outdated can only be expected to increase with the rapidity of technological change that exists in the current and foreseeable environment.

54. We propose, therefore, to remove the item lists from the USOA. However, because they are a useful and necessary tool to assist in assessing proper account classifications, the lists will be maintained and republished separately as necessary by the Commission. Because the list would not remain as an integral part of the Commission's Rules, changes can be made without the usual formal procedures. This, we believe, will keep the lists current and consequently more useful.

55. Similarly, the List of Retirement Units which itemizes types of property units to which retirement accounting requirements apply has effectively been illustrative because carriers have been allowed to submit their own lists to the Commission for approval. This list has also been revised and included in Appendix A (Reference Section 32.2(10)). But, for the same considerations indicated above on item lists, we propose that this list be removed from the USOA as well. However, the requirement for

submitting lists to the Commission for approval and for using such lists would remain as a necessary provision to ensure the continued consistency in application of a carrier's retirement accounting practices.

56. *Resolution of Minority Concerns.* Included with the TIAG report were several minority reports from Bellcore, GTE, and National Association of Regulatory Utility Commission (NARUC). Each of these reports raised certain objections to the TIAG report, and we have, in developing our proposal, taken care to resolve many of these objections where possible.

57. GTE pointed to the burden of the system changes on subject entities and objected to what it perceived as a deviation from certain TIAG concepts designed to ensure stability and consistency in the system. GTE believes that GAAP should be used for ratemaking; that jurisdictional considerations and *a priori* allocations have been included inappropriately in the system recommendation; that the subscriber/interoffice split was inconsistent with the concept for the plant accounts; and that the cost-type subaccount matrix was itself unduly burdensome.

58. Bellcore expressed its desire that the proposed Part 32 should treat all software as a period cost and avoid capitalization wherever possible. Further, Bellcore expressed concern for the potential cost of implementation and asked that the new USOA be reexamined accordingly.

59. NARUC's objections were manyfold, ranging from conceptual problems with the make-up of TIAG representation to specific accounting concerns such as the lack of definitive software treatment. Other NARUC concerns were directed at costing objectives, transactions with affiliates, basic service revenues and deferred revenue accounting, nonregulated activities, capital leases, GAAP, capitalization of certain costs, property record formats, depreciation accounting, and expensing inventory adjustments.

60. In this *Further Notice* we are making definitive proposals on the classification of and accounting requirements for carriers of different sizes; "below-the-line" accounting; accounting for nonregulated activities; clearing accounts; relaxed cost matrix requirements; identifying capitalized leases; classifying transmission assets; and addressing the issue of software capitalization. Further, other proceedings will be initiated or resolved addressing cost allocation to nonregulated activities; full adoption of generally accepted accounting principles in the USOA; separations and other costing issues; and accounting for litigation costs in general. Thus, most of the above-mentioned minority concerns are either resolved by our proposed Part 32 or remain under consideration in this proceeding or other proceedings of this Commission.

V. Implementation

61. It has been our intention, since release of the *Second Notice* in 1981, that the new USOA would be ready for implementation by subject carriers on January 1, 1986. We did not expect the system to be fully implemented as of that date. Given the magnitude of the overall system, such an expectation would have been unrealistic.

62. To point out the principal implementation issues involved and to provide us with a starting point to consider these issues, the TIAG prepared, as noted in paragraph 17 above, an issue paper focused on both general and specific USOA implementation concerns as perceived by the telecommunications industry as a whole. The paper runs the gamut of implementation issues, from industry-wide conformity and system interrelationships on the one hand to staff training and internal resistance to change on the other. The paper also explores several alternative possibilities for implementation plans designed to effect industry-wide adoption by January 1, 1988.

63. The principal issues raised by TIAG fall into two broad categories: those characterized by a *cost* of implementation and those concerning the *continuity* of records, data, and information flows. These two areas cause us the greatest concern and will, in all likelihood, dictate the implementation plan. Therefore, we will carefully consider and address each of them as an integral issue in this proceeding.

64. *Cost.* Whenever a new system, regardless of size, is implemented by any organization — or even if only a slight change is made to an existing system — there are attendant costs of implementation. Certain of these costs can be directly and easily identified, such as the acquisition costs of new data processing hardware and software or the formal training of personnel. Others may be less quantifiable, and indeed less objective, such as the costs associated with a loss in efficiency during the period in which the new or modified system is "coming on line."

65. As pointed out by the TIAG, the potential costs of implementing a new USOA will arise from virtually every corner of a given company's operations. There will be costs associated with system design, development, and modifications; with inventories of property, plant and equipment to facilitate reclassifications of associated accounts; with personnel training at all levels, both on and off the job; with the restructure of internal reporting, procedures, and controls; and with the reordering of records and record keeping systems, to name but a few. These costs will be direct or indirect; incremental or on-going depending on circumstance and perspective.

66. Of prime importance in addressing this issue, then, is an objective and reasonable quantification for the costs of implementation. Respondents are urged to make every attempt to provide the Commission with

cost estimates that are fully substantiated and appropriately categorized between direct costs (which are specifically and immediately traceable to a given effort) and indirect costs, and between incremental costs (which would not otherwise be incurred) and on-going costs. (Attempts to quantify subjective affects such as opportunity cost or interrupted productivity should be avoided.) Further, where possible, cost estimates should be identified with specific proposals of this *Notice.* Only with such detail can we make informed decisions on the impacts of our proposals and their proper disposition.

67. Because of our concern in this area, we have already taken steps in this *Notice* to reduce the burdens and complexities of the new system where such reductions have been reasonable and consistent with the objectives of this proceeding. We have incorporated where possible changes which we believe will result in significant reductions in implementation costs to many of the carriers subject to this system. More specifically, we have introduced technological bases for categorizing Cable and Wire Facilities and Circuit Equipment accounts which should abate significantly much of the potential cost attendant to inventories of these assets; and we have in many instances throughout the proposed system substituted subsidiary record category information provisions for what would otherwise have been detailed subaccount requirements, thus allowing greater flexibility and simplification in the carriers' internal system design process and resulting in a commensurate potential cost reduction.

68. *Continuity.* The continuity of records, data, and information flows may also pose a problem when viewed in terms of implementing a new accounting system. An essential underpinning of any body of accounting concepts is that of a continuous processing of like transactions in a consistent manner so that activities and results of those activities can be compared and interpreted from one period to the next. This is especially true in the area of depreciation rate represcription where changes in plant categorization and classification can cause significant disruption and distortion to the results of depreciation studies.

69. The implications of implementing a new system such as the proposed Part 32 are, thus, obvious. With changes proposed in virtually every account, the continuity of the records, data, and information flows at the detail level will be interrupted and will return only gradually over time as new records, new data, and new information flows ultimately become the norm.

70. We view resolution of this problem as a key to successful implementation of the proposed Part 32 and, as a result, will make every reasonable effort to mitigate its impacts. In the depreciation area especially, we will take into consideration all changes which impact on

rate represcription so that no rates will be unduly affected as a result of simple reclassifications. Respondents are asked to identify any other alternatives which will serve to preserve to the extent possible the continuity of records, data, and information flows and thus assist in the consistency of interperiod comparability and interpretation of results of operations.

71. *Implementation Alternatives.* With the above discussions serving as a framework, we turn now to alternative proposals for full USOA implementation, of which there are basically two: flashcut and phase-in.

72. Flashcut implementation would require complete and instantaneous conversion to the new accounting system as at some future date certain. This approach implies that the new system would be developed, programmed, trained for, and tested in its entirety while the current system based on Part 31 continues to function. At the specified date, the carrier's entire operation would be cut over to the new system. Under this alternative, we would propose full implementation of Part 32 as of January 1, 1987, with full annual reporting to the Commission due as of March 1, 1988.

73. The phase-in alternative would permit implementation of the new accounting system over time, on a systematic account by account (or logical group of accounts by group of accounts) basis. Under this alternative, reporting would also be phased-in accordingly, and system implementation would possibly begin in 1986.

74. At this time we do not favor either alternative over the other but, rather, are seeking comment on the feasibility of these alternatives and on any additional alternatives that might be explored. Serious recommendations in this area should include fully developed plans for implementation together with suggested timetables.

VI. Other Issues

75. While we have established accounts and accounting procedures for nonregulated activities as discussed in paragraphs 32.33 above, the identification and disposition of the actual costs attributable to these activities is an issue which we have yet to address fully. The Commission now has before it a discussion paper, submitted by the TIAG, on the determination of nonregulated costs in regulated entities. TIAG attempted to establish a mechanism which distinguishes regulated costs from nonregulated costs (where a single entity provides both regulated and nonregulated telecommunications products and services) and which would provide for the allocation or assignment of those costs to the nonregulated activities. The TIAG's recommendations are now under consideration by the Commission staff. The Commission, using the TIAG's work as a basis, will institute a separate proceeding with its proposals on this issue in the near future.

76. The Commission is also looking at the automated reporting requirements that will be associated with the revised USOA. The work in this area is of an on-going technical nature and will not culminate in firm propoals until such time as we adopt final requirements for, or disposition of, the revised USOA. Reporting considerations also raise questions as to Part 43 requirements and any necessary changes resulting from the USOA rewrite. At this point, however, our concern lies with satisfying the accounting system objectives as established by the *Second Notice.* The emphasis for now is on such issues as providing an adequate financial database, specifying the appropriate disaggregations of costs and revenues, and developing an accounting system that allows for regulatory and independent auditing and tracing of questioned entries. We are not, therefore, addressing reporting in this stage of the USOA revision and, accordingly, we are not seeking comments on reporting issues at this time.

77. In a *Memorandum Opinion and Order* in CC Docket 79-19, FCC 82-494, released November 15, 1982, the Commission assigned TIAG the task of determining the need for separate accounts, definitions, and rules pertaining to accounting for litigation expenses and amounts in settlement of antitrust lawsuits. The TIAG recommendation in response to this direction provides a separate expense account for the amounts expended for litigation and antitrust lawsuits. We do not believe that all such costs can be disposed of summarily in this manner. Furthermore, the implications of this issue appear to extend beyond the scope of pure accounting system design. Thus, the Commission will institute a separate proceeding on this issue in the near future.

78. Finally, we turn to the ultimate, underlying reason for the entire thrust of this proceeding—the demonstrated need of both this Commission and the industry for better costing. As pointed out in the *Second Notice,* we perceived a new USOA as being only one part (albeit the principal part) of the costing process. We viewed it as the financial system which would serve to feed separate, parallel subsystems or methodologies to derive realistic and representative cost allocations among the various regulatory jurisdictions and further among the specific telephone services or types of service. Other aspects of this costing process include separations, access charges, and interstate services which are being addressed in this and in other proceedings.

79. It is our tentative view that the proposal defined herein fully satisfies our need for the financial aspect of our total regulatory accounting system. It portrays in precise functional and technological terms the actual business of providing telephone services and breaks costs down into more discrete and analytical elements. It recognizes the current environment of the telephone industry and possesses the flexibili-

ty to accommodate readily any changes in the nature of that environment and in the technology that drives it. As a result, the proposed Part 32 should provide us with a far more highly flexible and informative basis to proceed with the identification and development of improved costing procedures than does the existing Part 31.

80. As an initial step in arriving at these improvements, however, it would first be necessary to ensure that the jurisdictional separations process continues unimpeded, assuming that we do adopt major changes or alternatives to the existing USOA. Because the Separations Manual (47 C.F.R. Part 67) is driven by the account groupings and account numbers specified in Part 31, any changes such as we are proposing herein would require a complete revision of the Separations Manual to conform it to the changes which may be adopted. Further, statutory dictates and the procedural requirements which are imposed on this Commission mandate that any such changes to the Separations Manual be preferred to the Commission only under the auspices of a combined Federal-state joint board. We will, therefore, initiate shortly a separate joint board proceeding to undertake the conformance of the Separations Manual to whatever USOA changes are adopted as a result of this proceeding.

81. In anticipation of such an eventuality, the TIAG did (as mentioned in paragraph 17 above) provide us with a conformed Separations Manual. This conformed manual was, however, based entirely upon the TIAG's recommendation for a new Part 32. Obviously, the adoption of any changes herein would require revision to the TIAG's draft, and, acknowledging this, the TIAG has offered to continue the Separations Manual conformance process to accommodate our decisions in this Docket.

82. Because we believe that a conformed draft Separations Manual will provide an invaluable starting point for any joint board activities resulting from this proceeding, we are disposed to accept the TIAG's offer for continued Separations Manual conforming efforts and hereby charge the TIAG to begin to develop a conformed draft Separations Manual as soon as possible. This draft in turn will be used as the basis for initial joint board consideration of formal revisions to the Separations Manual necessitated by our final actions in this Docket.

VII. Conclusion

83. In summary then, we are proposing the following:

a) Recission of Part 31 of the Commission's Rules and Regulations (Uniform System of Accounts for Class A and Class B Telephone companies);

b) Rescission of Part 33 of the Commission's Rules and Regulations (Uniform System of Accounts for Class C Telephone Companies);

c) Adoption of Appendix A to become Part 32 of the Commission's Rules and Regulations (Uniform System of Accounts for Telecommunications Entities);

d) Solicitation of additional substantive information on the issues attendant to eventual implementation of the proposed Part 32;

e) Continued consideration by the TIAG of necessary conforming changes to Part 67.

Comments are invited on these proposals as well as on any viable alternative germane to this proceeding. Where alternate proposals are offered, they should be complete in all respects.[4]

84. Copies of Appendix A and of the TIAG reports mentioned herein may be obtained from the Commission's contractor for public records duplication, International Transcription Services, Inc., 4006 University Drive, Fairfax, Virginia 22111, telephone in Virginia (703) 352-2400, in the District of Columbia (202) 296-7322. The contractor also maintains space in Room 246 at FCC headquarters, 1919 M Street, N.W., Washington DC. 20554.

85. We certify that the Regulatory Flexibility Act is not applicable to the rules we are proposing in this proceeding. Although some local exchange carriers are very small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity." The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 1, 23-24 (1980). To the extent that interexchange carriers are affected by these rules, we hereby certify that these rules will not have significant economic effect on a substantial number of small entities. At the time of publication of this *Further Notice* in the Federal Register, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

86. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

87. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed

[4] For example, on November 2, 1984, the United States Telephone Association (USTA) transmitted to the Commission a report setting forth its own recommendation for a complete revised USOA. We will view USTA's report (although not filed specifically in response to this *Further Notice)* as a formal comment in this proceeding and will give it full and careful consideration as such.

rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleading and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff, which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission's rules, 47 C.F.R. 1.1231. A summary of these Commission procedures governing *ex parte* presentations in informal rulemaking is available from the Commission's Consumer Assistance Office, FCC, Washington, D.C. 20554.

88. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and providing that the fact of the Commission's reliance on such information is noted in the Report and Order.

VIII. Ordering Clauses

89. ACCORDINGLY IT IS ORDERED, pursuant to the Provision of Sections 4(i) and 220(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 220(a), that there IS HEREBY INSTITUTED a notice of proposed rulemaking into the foregoing matters.

90. IT IS FURTHER ORDERED, that interested persons may file comments on the specific proposals discussed in this Notice on or before March 4, 1985. Reply comments shall be filed on or before April 3, 1985. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

91. IT IS FURTHER ORDERED, pursuant to Section 220(i), that the Secretary shall serve a copy of this Notice on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

The full text of proposed Part 32, Uniform System of Accounts for Telephone Companies, is not being published in the FCC Reports. Copies are available, however, through the Commission's contractor for public records duplication. Refer to paragraph 84 of this *Further Notice of Proposed Rulemaking* for specifics.

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PART 32 — UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS ENTITIES

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CHART OF ACCOUNTS CLASS B CARRIERS

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Interest and Dividends Receivable
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Accounts Receivable Allowance-Other
Notes Receivable Allowance
Material and Supplies
Prepayments
Other Current Assets

NONCURRENT ASSETS

Investments
Nonregulated Investments
Deferred Charges
Other Jurisdictional Assets-Net
Other Noncurrent Assets

REGULATED PLANT

Telecommunications Plant in Service
Telecommunications Plant Under Construction Short Term
Telecommunications Plant Under Construction Long Term
Property Held for Future Telecommunications Use
Nonoperating Plant

TELECOMMUNICATIONS PLANT IN SERVICE (TPIS)-DETAIL ACCOUNTS

Network Support Assets
Other Support Assets

Switching Assets
Information Orgination/Termination Assets
Transmission Assets
Network Operations Assets
Other Assets
Amortizable Tangible Assets
Amortizable Intangible Assets

RESERVES

Accumulated Depreciation
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Accumulated Amortization-Tangible
Accumulated Amortization-Intangible
Accumulated Amortization-Other
Deferred Income Taxes

CURRENT LIABILITIES

Account Payable
Notes Payable
Advance Billing and Payments
Customer's Deposits
Current Maturities-Capital Leases
Other Accrued Liabilities
Other Current Liabilities

LONG TERM DEBT

Obligations Under Capital Leases
Other Long Term Debt

OTHER LIABILITIES AND DEFERRED CREDITS

Other Long Term Liabilities
Other Deferred Credits
Other Jurisdictional Liabilities and Deferred Credits-Net

STOCKHOLDERS EQUITY

Capital Stock
Additional Paid-in Capital
Treasury Stock
Other Capital
Retained Earnings

INCOME STATEMENT ACCOUNTS

REVENUES

Private Network Services Revenue
Public Network Services Revenue
End User Revenue
Carriers' Carrier Facilities Revenue
Special Access Revenue
Customer Premises Facilities Service Revenues
Miscellaneous Revenue

PLANT SPECIFIC OPERATIONS EXPENSE

Net Support Expense

Other Support Expense
Switching Expense
Information Originating/Termination Expense
Transmission Expense
Network Operations Expense

PLANT NON-SPECIFIC OPERATIONS EXPENSE

Other Property, Plant and Equipment Expense
Network Expense
Access Expense
Depreciation Expense
Amortization Expense

CUSTOMER OPERATIONS EXPENSE

Marketing
Services

CORPORATE OPERATIONS EXPENSE

Executive and Planning
General and Administrative
Provision for Uncollectible Accounts Receivable
Provision for Uncollectible Notes Receivable

OTHER OPERATING INCOME AND EXPENSE

Income from Customer Work
Income from Plant Rentals
Return from Nonregulated Use of Regulated Facilities
Gains and Losses from Foreign Exchange
Gains or Losses from Disposition of Land and Artwork
Other Operating Gains and Losses

OPERATING TAXES

Operating Investment Tax Credits-Net
Operating Federal Income Taxes
Operating State and Local Income Taxes
Operating Other Taxes
Provision for Deferred Operating Income Taxes-Net
Provision for Deferred Nonproperty Related Operating Income Taxes-Net

NONOPERATING INCOME AND EXPENSE

Dividend Income
Interest Income
Income from Sinking and Other Funds
Allowance for Funds Used During Construction
Gains or Losses from the Disposition of Certain Property
Other Nonoperating Income
Special Charges

NONOPERATING TAXES

Nonoperating Investment Tax Credits-Net
Nonoperating Federal Income Taxes
Nonoperating State and Local Income Taxes
Nonoperating Other Taxes
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Provision for Deferred Nonproperty Related Nonoperating Income Taxes-Net

INTEREST AND RELATED ITEMS

Interest Expense

Interest Expense-Capital Leases

Amortization of Debt Issuance Expense

EXTRAORDINARY ITEMS

Extraordinary Income-Net

JURISDICTIONAL DIFFERENCES AND NONREGULATED INCOME ITEMS

Income Effect of Jurisdictional Ratemaking Differences-Net

Nonregulated Net Income

Common Carrier, Customer-provided Equipment
Common Carrier, Interconnection
Dataphone Digital Service, Interstate
Declaratory Ruling
Telephone Equipment, Registration of

Chief, Common Carrier Bureau rules that central office-located multiplexing and E and M signalling conversion equipment is not "customer premises equipment", and that it may be provided without structural separation by carriers subject to structural separation under *Computer II.*
—*U.S. Transmission Systems, Inc.*

Del. Auth. 85-01

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

United States Transmission Systems, Inc.

Petition for Declaratory Ruling to remove uncertainty concerning the status of central office channel termination equipment under Section 64.702 of the Commission's Rules, and under the Commission's decisions in CC Docket No. 81-216

DECLARATORY RULING

Adopted: Jan. 10, 1985; Released: Jan. 11, 1985

BY THE CHIEF, COMMON CARRIER BUREAU:

1. On January 3, 1985, United States Transmission Systems, Inc. ("USTS") made two filings with the Commission requesting alternative relief with respect to the circumstances outlined below. We conclude that one of these filings, a request for declaratory ruling filed pursuant to Section 1.2 of the Commission's Rules, is meritorious; that it raises only an issue of legal interpretation of existing Commission rules, policies and decisions which can be resolved without the need for responsive plead-

ings; and that the requested interpretation should be issued expeditiously. We do so herein.

2. By contract awarded in May, 1984, the General Services Administration ("GSA") selected USTS to provide intermachine private line voice trunks to be used as part of the Federal Telecommunications System. Common channel switching arrangement ("CCSA") switches to be used with these trunks are to be provided GSA by AT&T Communications ("AT&T") within central offices available for the use of AT&T. In order for USTS to connect its trunks with these switches, it has sought to make arrangements with the appropriate Bell Operating Companies (hereafter, "BOCs") in each relevant Bell area to provide circuits between USTS' locations and the CCSA switches.

3. USTS claims that in a number of instances the BOCs, citing a shortage of available individual copper pairs, have offered to provide the needed circuits using digital T-carrier facilities, which multiplex twenty-four voice-grade channels on a single 1.544 megabit stream, thereby minimizing the number of copper pairs required. However, USTS asserts that at least one (unnamed) BOC has claimed that it is variously barred from providing this service under the provisions of the Commission's *Computer II* rules, 47 C.F.R. §702, the Commission's decisions in CC Docket No. 81-216, *Amendment of Part 68 of the Commission's Rules*, 94 FCC2d 5 (1983), *recon. denied*, ___ FCC 2d ___ FCC 84-145, released Apr. 27, 1984 (hereafter, "*NCTE* " decisions), and/or the Commission's *Special Access Order* in CC Docket No. 83-1145, ___ FCC 2d ___ FCC 84-524, released Nov. 9, 1984.

4. The concern of this BOC appears to be that provision of T-carrier facilities in these circumstances requires the use of multiplexers at the AT&T central office ends of the channels; that the Commission has concluded in its *NCTE* decisions that digital multiplexers as a species of network channel terminating equipment ("NCTE") are unregulated customer premises equipment that may only be furnished by a BOC through structural separation; that the central office is a premises within the meaning of these decisions; and that therefore a BOC may not install such equipment in the central office, as to do so could be inconsistent with the *Computer II* requirements for structural separation. Thus, according to USTS, this BOC concludes that it cannot furnish the needed multiplexer to terminate the T-carrier service at AT&T's central office-located CCSA switch, and, given the alleged shortage of alternative copper wire facilities, USTS cannot perform under the contract.

5. Since USTS needs the circuits, quite naturally it then asked AT&T to provide the multiplexers. According to USTS, AT&T responded to this request by stating that it cannot provide the T-channel derivation equipment because it does not presently have a tariff covering this

offering; it had included a provision for unbundled multiplex equipment in the tariff accompanying Transmittal No. 115 that was rejected by the Chief, Common Carrier Bureau.[1] Furthermore, USTS asserts that AT&T "does not believe it appropriate to permit USTS to locate USTS-provided T-carrier multiplex equipment at the AT&T-C switch location."

6. Finally, USTS states that in order for its channels to be connected to AT&T's switching equipment, a conversion is required from eight to four wire operation for "type ½ E and M signalling" and that "the plain engineering fact is that, unless the USTS operating locations were physically adjacent to the AT&T-C switches, which they are not . . ., the signalling conversion must take place at the AT&T-C switch location. Neither AT&T-C nor certain BOCs feel they are the proper providers of this signalling conversion capability, apparently because, again, of the restrictions of *Computer II.* "

7. In this declaratory ruling, we address the proper treatment of central office-located multiplexers and signalling conversion equipment under the Commission's *Computer II* rules and its *NCTE* decisions[2] [3] and conclude that this equipment is not "customer premises equipment." Furthermore, we conclude that the E/M lead conversion may properly be associated with basic service under the Commission's *Protocol Inquiry* decision, addressed *infra.*

8. *Channel Termination Equipment in Central Offices.* In its initial *NCTE* decision, the Commission concluded that "CSU-like devices should be accorded the same regulatory treatment as any other customer premises equipment, as set forth in our *Computer II* decisions." 94 FCC2d at 15. This conclusion was, by its terms, limited to "customer premises" equipment, and did not comprehend equipment at the central

[1] Letters of June 28, 1984 and July 16, 1984 from the Chief, Tariff Division of the Common Carrier Bureau to AT&T Communications declaring proposed Tariffs F.C.C. Nos. 3 and 6 and subsequent transmittals void in view of the Commission's June 27, 1984 adoption of a Memorandum Opinion and Order finding these proposed tariffs unlawful.

[2] We assume that USTS would be ordering 1.544 mb/s channels for this service and not groups of 24 voice-bandwidth channels delivered on multiplexed facilities. Were the latter to be ordered these issues would not arise. Multiplexing within carriers' network facilities is permissible to deliver multiple channels ordered by the customer. *See,* Final Decision, 77 FCC2d 384, 447 n.57 ("Excluded from CPE is . . . multiplexing equipment to deliver multiple channels to the customer.").

[3] We do not address whether USTS should have the right to locate its own multiplexing equipment at the central offices. Rather, we conclude in the body of this ruling that the Commission's NCTE and Computer II decisions are no impediment to the provision of such equipment by AT&T or the Bell Operating Companies. To ensure non-discrimination in the provision of 1.544 mb/s channels between a central office and a customer premises, on the one hand, and provision of such channels between two customer premises, on the other, the charge for any such multiplexer should be unbundled from the 1.544 mb/s channel rate.

office of the carrier providing the channel(s) to be connected with such customer premises equipment. Furthermore, the actual language of the *NCTE* decision allays any remaining uncertainty on this point because it explicitly refers to "treatment . . . as set forth in our *Computer II* decisions." *Id.*

9. The basis for the Commission's deregulation of customer premises equipment in the referenced *Computer II* decisions was its *Carterfone* [4] and registration program[5] decisions opening the customer premises equipment market to competition by non-carriers. *Second Computer Inquiry Final Decision,* 77 FCC 2d at 439-40 (1980). Significantly, however, the *Carterfone* and registration program decisions, on which the treatment of customer premises equipment in *Computer II* was grounded, are limited to equipment at customers' premises, and do not govern equipment at the central office of the carrier providing the channel(s) to the premises equipment.[6] Thus, based both on the language of the *NCTE* decision, and the *Computer II* and predecessor principles referenced therein, the structural separation applicable to provision of customer-premises equipment by AT&T and the BOCs pursuant to Section 64.702 of the Commission's Rules and our *Computer II* decisions does not apply to the central office channel termination and interconnection equipment needed by USTS.[7]

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[4] Carterfone, 13 FCC2d 420, *recon. denied,* 14 FCC2d 571 (1968).

[5] *E.g.,* First Report and Order, 56 FCC2d 593 (1975), Second Report and Order, 58 FCC2d 736 (1976), *aff'd sub nom.,* North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977).

[6] *E.g.,* Carterfone, 14 FCC2d 149, 150 and 14 FCC2d 571, 572 ("The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone . . . . Nor, of course, were we concerned with the interconnection of telephone companies."); Third Report and Order, 67 FCC2d 1255, 1276-77 (addressing the relationship registered equipment to its use at a customer's "premises"). *See also,* Investigation of Access and Divestiture Related Tariffs, 97 FCC2d 1082, FCC 84-51, released Feb. 17, 1984 at para. 73 (requiring removal from access tariffs of new requirements that the Part 68 terminal equipment registration rules apply to carrier-carrier interconnection).

[7] Our conclusion on this point is not altered by the fact that the multiplex equipment involved here would be located physically in an AT&T office, rather than the office of the Bell Operating Company furnishing the channel(s) to USTS. Under the modification of final judgment ("MFJ") governing AT&T and the divested Bell Operating Companies (BOCs) and the implementing plan of reorganization accepted by the district court, ownership of "circuit equipment" physically within AT&T central offices, which appears to include multiplexing equipment of this nature, is treated on a predominant use basis similar to the treatment of these trunks. *See,* MFJ Section IV.F., reproduced in United States v. Am. Tel. and Tel. Co., 552 F.Supp. 131, 230-31 (D.D.C. 1982), *aff'd,* 103 S.Ct. 1240 (1983); Plan of Reorganization, 17-22, filed in Civ. Action No. 82-0192 (D.D.C., Dec. 16, 1982), *accepted,* United States v. Am. Tel. and Tel. Co., 569 F.Supp. 1057, 1097 (D.D.C. 1983). Thus, in these circumstances, some multiplex equipment physically within AT&T's central offices is owned by the BOCs, and is effectively tantamount to being located within the central offices of the BOCs.

10. *Signalling Conversion.* The final difficulty faced by USTS is that neither AT&T nor at least some of the BOCs appear to believe that they are free to provide necessary equipment to convert the E and M signals from eight to four wires. However, E and M lead signalling is a conventional use of a telephone channel to send and receive supervisory on-hook/off-hook signals from each end of the channel. *See, e.g.,* Section 68.3(f) of the Commission's Rules. Under the Commission's *Communications Protocols* decision, 95 FCC2d 584, 596 (1983), "protocol processing involved in the initiation, routing and termination of calls (or subelements of calls, e.g. packets) is inherent in switched transmission and is not within the definition of enhanced service . . . . Such protocol processing or conversion may be associated either with basic or enhanced service without affecting the classification of such service under Section 64.702(a) of [the Commission's] rules." The E and M lead signals of which USTS seeks conversion are within this category, and AT&T and the BOCs are free to convert them as needed without constraint under *Computer II.*

Summary and Conclusions

11. In summary, we herein clarify that the Commission's *Computer II* and *NCTE* decisions by their terms did not address central office-located channel termination and interconnection equipment, and that conversion of the E and M lead signals that are used to initiate, route and terminate calls is permissible in connection with the provision of otherwise basic services. Accordingly, the Petition for Clarification of Part 64 of the Rules filed on January 3, 1985 by USTS IS HEREBY GRANTED, pursuant to Section 1.2 of the Commission's Rules, and authority delegated in Sections 0.91 and 0.291 thereof.[8]

FEDERAL COMMUNICATIONS COMMISSION

ALBERT HALPRIN, *Chief, Common Carrier Bureau*

[8] USTS' companion Petition for Waiver is hereby dismissed as moot in view of our clarification that the Computer II rules are inapplicable to these circumstances

Deposition, Authority to Take
Review Board, Interlocutory Matters
Special Relief
Stay, Irreparable Injury

Review Board stays subpoena of witness for testimony in D.C. based on his unrefuted showing that his daughter's health would be imperiled by his trip from California. The ALJ may compel the parties to take his deposition, which can be videotaped.
—*Valley Broadcasters, Inc.*
BC Docket No. 82-436

FCC 85R-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Valley Broadcasters, Inc. Kaps, Mount Vernon, Washington	BC Docket No. 82-436 File No. BP-801112AB
Northwest Indian Women Broadcasters, Inc. Portland, Oregon	BC Docket No. 82-437 File No. BP-801113AD
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted January 28, 1985; Released: January 31, 1985

BY THE REVIEW BOARD:

1. On January 23, 1985 counsel for Leonard Kesselman, a necessary witness in this case, filed a motion for stay and a motion for special relief. Time is of the essence since Mr. Kesselman is scheduled to testify on January 29; the Board therefore requested expedited responses from the other parties to the proceeding. On January 25, 1985, Northwest Indian Women filed comments in support of the motions and Valley Broadcasters filed comments urging that the hearing not be further delayed. We find Mr. Kesselman has satisfied the procedural requirements set out in *Hanover Radio, Inc.*, 91 FCC 2d 849, 52 RR 2d 403 (Rev. Bd. 1982), and he

has shown a strong likelihood of success on the merits because the action below conflicts with the Review Board's decisions in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 834, 50 RR 2d 1117, 1122 (Rev. Bd. 1981), and *GAF Broadcasting Co.*, 96 FCC 2d 411 (Rev. Bd. 1984). Accordingly, we will stay the subpoena and direct the parties subject to the Administrative Law Judge's supervision to develop an alternative method for taking Mr. Kesselman's testimony which will not endanger the health of his young daughter.

2. Mr. Kesselman is the local counsel for Indian Women who was personally involved in a search for a transmitter site, and the Administrative Law Judge has apparently ruled that this type of evidence is relevant to this case. Mr. Kesselman was therefore called upon to testify in Washington, D.C. but indicated that he would be unable to do so in the near future because his daughter's doctor advised against his absence from California while she was being treated for a serious illness. At the request of Indian Women, the ALJ on December 20, 1984, issued a subpoena directing Kesselman to appear at the hearing to be held in Washington, D.C. on January 29, 1985. On January 11, 1985, counsel for Kesselman filed a motion to limit the subpoena so that his testimony could be taken in California on January 29, by deposition or speakerphone, or in the alternative in Washington in April of 1985. This request was supported by several statements from the daughter's doctor which apparently have not been contested by any of the other parties to the case. Nevertheless, the motion to limit the subpoena was denied because "the methods suggested for alternatives to taking Mr. Kesselman's testimony have previously been considered at length and both methods of taking Mr. Kesselman's testimony (speakerphone or deposition) have been rejected," FCC 85M-266, released January 17, 1985, and because the illness of his daughter had resulted in previous continuance of the original October 16, 1984 hearing date.

3. The pleadings before us contain the special showing required by *Hanover Radio, Inc., supra:* (1) irreparable injury to Kesselman, (2) insubstantial harm to the other parties, (3) likelihood of prevailing on the merits, and (4) the public interest. In two previous decisions, *supra*, para. 1, the Board has held that, when some non-frivolous medical information is provided which demonstrates that forcing a witness to testify in Washington, D.C. might endanger health, all available alternatives should be fully exhausted before the witness can be compelled to travel to Washington to testify. Here the ALJ found that: "A doctor's statement notes that the daughter was released from a mental hospital in October, 1984 and while the daughter now carries on normal activities, she is being treated for psychotic depression with suicidal ideation and the father's availability is required at all times." FCC 85M-266 at n. 3. The doctor's

most recent statement, dated January 7, 1985, indicates that, based on current progress, "Mr. Kesselman could travel to Washington some time in April without severely jeopardizing . . . treatment or recovery. This opinion is only an estimate which could change based on . . . future response to treatment." The doctor's statements were apparently not disputed, nor is it necessary for us to rule on their substance. Under the circumstances of this case, we are unable to perceive from the record before us why the alternative of taking Kesselman's testimony in California by deposition would have adversely affected the interests of justice or the opposing party.

4. The Board can appreciate the ALJ's desire to avoid further delays in this case. While we note that counsel for Kesselman has indicated that the public will not be adversely affected by a short delay, since the two communities in question already receive service from local broadcast stations, our action does not compel a delay even until April since the ALJ has authority to compel the parties to take Kesselman's deposition in California, *cf. Industrial Business Corporation,* 47 FCC 2d 891, 30 RR 2d 1123 (Rev. Bd. 1974), as soon as practicable. If necessary the deposition can be videotaped to preserve any demeanor evidence for the consideration of both the ALJ and any reviewing authorities.

5. ACCORDINGLY, IT IS ORDERED, That the motions for stay and for special relief filed January 23, 1985, ARE GRANTED to the extent indicated above, and are otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*